Office of the Governor

A CRITICAL STUDY

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To Sudesh

my wife and life companion

CONTENTS

"In the Provinces you are going to have democracy from toe to neck and autocracy at the head. I would have cited how the Governor who was an agent of British imperialism has all along been attempting to smash my party. What was being done by the Governor under British imperialism may also be repeated...."

Biswanath Das

C.A.D.

C.A.D., September 30, 1949.

I

Appointment, Term, Qualifications and Emoluments

METHOD OF APPOINTMENT

Direct Election

According to article 155 of the Constitution, the Governor of the State is to be appointed by the President by warrant under his hand and seal. Here it should be noted that according to the Principles of the Model Provincial Constitution as adopted by the Constituent Assembly, the Governor was to be elected directly by the people on the basis of adult franchise.[1] Subsequently, when this matter was discussed by the Drafting Committee, some of the members were of the opinion that "the co-existence of a Governor, elected by the people and a Prime Minister responsible to the Legislature might lead to friction and consequent weakness in administration."[2] Hence, they proposed that the Governor of the State should be "appointed by the President under his hand and seal from a panel of four candidates to be elected by the members of the Legislative Assembly of the State or where there is a Legislative Council in the State, by all the members of the Legislative Assembly and of the Legislative Council of the State assembled together at a joint meeting, in accordance with the system of proportional representation by means of the single transferable vote."[3] But later on "the special committee considered the mode of selection of Governors and was of the view that the Governor should be directly appointed by the President and that it was not necessary to provide for a panel of candidates for such appointment."[4]

Hence, when Article 131 of the Draft Constitution was discussed by the Constituent Assembly, it had the following three proposals before it, for the appointment of the Governor:

(i) He should be directly elected by the people on the basis of adult franchise.

(ii) He should be appointed by the President out of a panel of four candidates elected by the State Legislature in accordance with the system of proportional representation by means of a single transferable vote.

(iii) He should be directly appointed by the President by a warrant under his hand and seal.

The proposal that he should be directly elected by the people on the basis of universal adult franchise was rejected because:

1. It was felt that if he was elected by the adult franchise of all citizens while the Prime Minister was there as only the leader of the majority party in the Legislative Assembly, in the event of a conflict between them, the position of the Governor may be superior to that of the Prime Minister, with the prestige of a general election by adult franchise he might seek in a given contingency, to override the powers of the Prime Minister. That would inevitably lead to a conflict. This possibility has to be obviated."[5]

2. Since the real powers have been vested in the Chief Minister and his Cabinet, hence the outstanding persons in the political life of the State would prefer to be Ministers and not Governor. As a result thereof, the party in power at the State level would put only second rate persons for election to the office of Governor and the Governor would most probably be the nominee of the Chief Minister. "The expenditure and energy of a Province under election would have been wasted in putting second rate man in the party at the head of the Government."[6]

3. It was also pointed out that one of the essentials of the successful Cabinet Government in a Province or in the country as a whole was the existence of a fairly impartial constitutional head who is more or less a constitutional figurehead. If the Governor was to be elected by the direct vote of all voters in a Province, he was likely to be a party man because the election was to be on party lines.[7]

4. Besides this, the elected Governor would have usually belonged to the majority community. According to Jawaharlal

Nehru, "it is obviously desirable that eminent leaders of minorities--I use the word for the sake of simplicity: in future I hope we will not use the words 'majority' and 'minority'—eminent leaders of groups should have a chance. I think they will have a far better chance in the process of nomination than in election."[8]

5. It was also pointed out that it "would be desirable to have people from outside—eminent people, sometimes people who have not taken too great a part in politics. Politicians would probably like a more active domain for their activities but there may be an eminent educationist or persons eminent in other walks of life, who would naturally, while cooperating fully with the Government and carrying out the policy of the Government, at any rate helping in every way so that that policy might be carried out, would nevertheless represent before the public some one slightly above party and thereby, in fact, help that Government more than if he was considered as part of the party machine."[9]

Panel System

As an alternative to the direct election, some of the members of the Constituent Assembly suggested that the President should appoint the Governor out of a panel of three or four persons elected by the State Legislature on the basis of a proportional representation by means of a single transferable vote system. But this panel system was also rejected on the following grounds:

1. "Suppose the Legislature of the State submits a panel of four or five names to the President for selection and suppose the President—because after all every one is guided ultimately by his own views or conscience or his own judgement in every matter—chooses not the first nominee but the second or third or fourth or the 9th. Then the Legislature of the State will certainly have a grouse against the man chosen by the President because he has been chosen in preference to the first man. Therefore, the relations that will ensure from this appointment of one from among the panel—the relations between the Ministers or Legislature in the State and this new Governor—will not be very cordial and happy."[10] Hence, in order to maintain the cordial relations between the Legislature and the Governor, between the State Ministry and the Governor, between the Centre and the State the President would have no alternative but to "support the candidate who has obtained the largest number of votes. If he goes out of his way

and selects any one of the other three, it is sure to lead to friction and continuous friction betweeen the Province and the Centre...In the net result, if the President is to get on smoothly with the Province he has merely to say ditto and confirm the appointment of a person who obtained the largest number of votes in the Provincial Legislature."[11]

2. It was also felt that in the interest of All-India-Unity, and with a view to encouraging centripetal tendencies, it was necessary that the authority of the Government of India should be maintained intact over the Provinces. To say that the President may nominate from a panel of names really means restricting the choice of the President. It would have given the power into the hands of the Legislature. It was necessary that the President should be free from the influence of the Legislature. It was also pointed out that a person from the same Province should not be appointed as its Governor because it would give encouragement in fissiparous tendencies. Hence, it was contended that the choice of the President should be unrestricted and unfettered [12]

NOMINATION

After rejecting the direct as well as the indirect method of election, the members of the Constituent Assembly decided that he should be appointed by the President and we find that there is a parallel analogy in the constitution of Canada where "the Lieutenant-Governor of each of the Provinces is appointed by the Governor-General, that is by the Governor-General on the advice of the Cabinet. There are many features of resemblance and similarity between the Canadian Constitution and our Constitution which, by some critics, has been considered to be quasi-federal. The system in the main we have accepted is the Principle of responsible Government obtaining in the Dominions or in the different parts of the Commonwealth. Nowhere does the system of election of the Governor exist where the institution of responsible Government is the main feature, of the Constitution."[13]

Alladi Krishnaswami Ayyar who was one of the prominent members of the Drafting Committee, while supporting this method of the appointment of the Governor said that "in the normal working of the Constitution, I have no doubt that the convention will grow up, of the Government of India consulting the Provincial Cabinet, in the selection of the Governor. If the choice is left to

the President and his Cabinet, the President may, in conceivable circumstances, with due regard to the conditions of the Province, choose a person of undoubted ability and position in public life who at the same time has not been mixed up in Provincial party struggle or factions. Such a person is likely to act as a friend and mediator of the Cabinet and help in the smooth working of the Cabinet Government in the early stages. The Central fact to be remembered is that the Governor is to be constitutional head, a sagacious councellor and adviser to the Ministry, one who can throw oil over troubled water. If that is the position to be occupied by the Governor, the Governor chosen by the Government of India, presumably with the consent of the Provincial Government, is likely to discharge his functions better than one who is elected on a party ticket by the Province as a whole based upon the universal suffrage or by Legislature on some principle of election."[11]

Dr B.R. Ambedkar, the Chairman of the Drafting Committee, however said that "it has been said in the course of debate that the argument against election is that there would be rivalry between the Prime Minister and the Governor, both deriving their mandate from the people at large. Speaking for myself, that was not the argument which influenced me because I do not accept that even under election there would be any kind of rivalry between the Prime Minister and the Governor, for the simple reason that the Prime Minister would be elected on the basis of policy, while the Governor could not be elected on the basis of Policy, because he could have no policy, not having any power. So far as I could visualise, the election of the Governor would be on the basis of personality; is he the right sort of person by his status by his character, by his education, by his position in the public to fill in a post of Governor? In the case of Prime Minister the position would be; is his programme suitable, is his programme right? There could not therefore, be any conflict even if we adopt the principle of election."[12]

He, however, further said: "I want to warn the House that the real issue before the House is really not nomination or election—because as I said this functionary is going to be a purely ornamental functionary, how he comes into being, whether by nomination or by some other machinery, is a purely psychological question—what would appeal most to the people—a person

nominated or a person in whose nomination the Legislature has in some way participated. Beyond that, it seems to me it has no consequence. Therefore, the thing that I want to tell the House is this: that the real issue before the House is not nomination or election, but what powers you propose to give to your Governor. If the Governor is purely constitutional Governor with no power more than what we contemplate expressly to give him in the Act and has no power to interfere with the internal administration of the Provincial Ministry, I personally do not see any very fundamental objection to the principle of nomination."[16]

In this connection, it may, however, be pointed out that Pandit Jawaharlal Nehru[17] as well as Alladi Krishnaswami Ayyar[18] mentioned in the Constituent Assembly that there was likely to be a convention that while appointing the Governor, the Provincial Cabinet would be consulted. There is such a convention in Canada.[19] In Australia too, though under a different constitution, a similar convention has grown up and the Governor of a State is appointed on the advice of the Provincial Government.[20]

Hence, after considering the various pros and cons of the problem it was decided that the Governor should be appointed by the President. But the question is as to how far the system of nomination has fulfilled the hopes of the framers of the Constitution. One of the arguments given in favour of the nomination and against the system of election was that if he is elected, then he would be a party man, but if he is appointed by the President, he would be a non-party man. But this expectation of the framers of the Constitution has not been fulfilled because usually the Governors are the party men and some of them remain active party men and actively participate in the party affairs and have been making political speeches even after their appointment as Governor. For instance, when he was the Governor of Kerala, Ajit Prasad Jain, "got interested in the election of the Prime Minister on the sad and sudden death of Shri Lal Bahadur Shastri. Though as a Governor he was expected to be above party politics, he took active part in canvassing for Shrimati Indira Gandhi for the Prime Ministership as against Morarjibhai Desai, the other candidate for the office."[21] Similarly, as a Governor of Kerala, A.P. Jain said: "The line advocated by the left Communist leader, Namboodiripad was "anti-India" and majority of the left communist were following this line although the party had

officially aligned itself with the defence efforts.... He felt that Namboodiripad and his friends were in a way doing service by advocating surrender of Azad Kashmir to Pakistan and Aksai Chin to China because more and more people were now being convinced that the Union Home Minister, Nanda acted wisely in putting left Communist to Jail."[22] Similarly N.V. Gadgil, when he was the Governor of Punjab, "asked Harijans of Muktsar not to be influenced by political parties or their pressure tactics but to cast their votes freely...If Prime Minister Nehru was returned to power, he added, it would have an important bearing on the world peace."[23] Dharam Vira, the Governor of Mysore, presided over a function which was held "to felicitate Tulsi Das Dasappa on his election as a Secretary of the Congress Parliamentary Party."[24] Even B. K. Nehru, the Governor of Assam wrote two articles in favour of the Congress -the opposition alleged during the Lok Sabha poll in the State and he exercised his vote in the Parliamentary election of 1970.[25] At the time of the elections of 1967, Dr Sampurnanand, the Governor of Rajasthan "had clearly stated that the Congress Government alone can provide stability and continuity in the country."[26] While commenting on the role of Shri Ajit Prashad Jain, Sri Prakasa, the former Governor of Assam and Madras writes that "it cannot be denied that as long as any one is in any particular office, however irksome its limitations may be, he has to submit to them. Though one can sympathise with Mr Jain, one cannot help feeling that it was not proper on his part to participate in controversial politics while he held the office of the Governor."[27]

But A.P. Jain does not agree with this view and in his defence he says: "at the time of my appointment as a Governor, I made it clear that well before the general elections I would be laying down the reins of office and re-enter politics. In my several press conferences, I stated the position. Thus it would be seen that the politician in me was not dead."[28] He further says that "there is no uniform code of conduct for Governors. In America the Governors actively participate in Presidential elections. Under the British pattern the office of the Governor is gubernatorial. However, it is a moot question whether a functioning Governor, who takes political decisions and participates in political decisions, as I have been doing in various committees and conferences of the Union, should not be treated more like an American Governor."[29]

It may, however, be pointed out here that when Dr Rajendra Prasad was the President, he made an effort to ensure that the Governors do not participate in the active politics. For instance, Sri Prakasa says: "I know of one Governor who thought he could continue to be a member of the All India Congress Committee even as Governor. I know of other Governors who used to go to their States and undertake political tours. In all such cases, the President--even the very mild, gentle and gracious Dr Rajendra Prasad--had to intervene, and though he himself had been a most prominent and a most respected leader of the Congress, he had to tell the Governors concerned that they should not indulge in politics. The Governors could not keep such restrictions on themselves and they resigned."[30] But he too succeeded only partly.

It may, however, be mentioned here that if the Governors are appointed from the public men, they would mostly be party men. But in spite of that Sri Prakasa is of the view that "...it is but right that Governors should be drawn from public life. It would be good precedent if central Ministers are sent at the end of their term of office--and not when they are defeated at the polls—to be Governors. A Governorship should be the last lap on the journey of a politician. The only other office that he could fill would be that of Vice-President and President after having been Governor. If this convention is recognised then the Central Minister who later become Governor, will cast all his politics aside and take the place of an elder Statesman who will be placed in the high position of a Governor, and looked up to by all parties as their friend and well-wisher. If Governors can later become Ministers or hold other official positions, then the dignity of the office is marred "[31]

But unfortunately it is not so and there are instances where the Governors after completing their terms have become Ministers or accepted other jobs. For instance, Biswanath Das, after having been a Governor of UP, became the Chief Minister of Orissa. C. Rajagopalachari, after having been the Governor-General of India, became the Chief Minister of Madras. Ajit Prasad Jain, after having been the Governor of Kerala, contested election to the Lok Sabha. Mrs Vijayalakshmi Pandit after having been the Governor of Bombay became a Member of Parliament, Hare Krushna Mahtab, after having been the Governor of Bombay,

became the Chief Minister of Orissa in 1958, Y.S. Sukhtankar, after retiring as a Governor of Orissa accepted a small job of the chairmanship of a small public sector company.[32] D.K. Borooah, the Governor of Bihar, became a Minister in the Centre. If the dignity of the office is to be maintained, then it seems that there should be a constitutional bar that a person who has held the office of the Governor will not hold any office except that of the President and Vice-President. But in that case, it is suggested that the Governor, like the President should also get some pension according to his status so that he may be able to maintain himself with dignity and honour. The suggestion that the Governor should get a pension on his retirement was made by Prof. K.T. Shah in the Constituent Assembly as well[33] but it was rejected.[34] K. Santhanam has suggested that his salary should be reduced by Rs 1500 and provision should be made for a pension of Rupees 750 per month. (*The Statesman*, April 17, 1967. p.6)

It will also not be out of place to mention here that discredited, defeated, and disgruntled politicians should never be appointed to fill the office of the Governor because we find that such persons when "called upon to uphold the Constitution, often fell from the standards they are expected to uphold."[35] There are many instances, where defeated politicians have been appointed as Governor, but they are not the right type of persons for this office and the Administrative Reforms Commission seems to be correct when it says that "...many of those who have filled post of Governor during the last 19 years have fallen short of this standard. It is our considered view that the real reason for this state of affairs is not the paucity of suitable persons, but the lowly place given to the post of Governor in the minds of those responsible for making these appointments...The post came to be treated as a sinecure for mediocrities or as a consolation prize for what are sometimes referred to as "burnt out" politicians. Most of the persons selected were old men of the ruling party at the Centre."[36]

Hence, the ARC recommended that, "the attitude of the Centre towards these appointments should undergo a radical change. Instead of these posts being treated as sinecures, they should be given due recognition as vital offices in the federal fabric of Indian Administration. This should result in patronage and politics giving way to merit as the test of selecting Governors .. We would

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not go so far as to say that those who have taken part in politics should be totally barred from consideration. But we would suggest that selection should not be confined to the party in power at the Centre and that in fact the research for talent should extend not only outside the ruling party but also outside the political sphere itself."[37]

It may also be mentioned here that some of the civil servants have not proved to be good Governors, whereas some of the party men have brought considerable credit to the post of Governor. Hence, while appointing a Governor, besides other factors, the personal merit of the person should be one of the important considerations.

Another point in favour of nomination was that the Governors would be usually appointed by the President in consultation with the State Government. Hence, a person who is acceptable to both the Governments would be helpful in maintaining the proper relations between the Centre and the States. Though there has been some such practice between 1950-67 when the centre as well as the States were being ruled by the Congress Party, but in 1967, when in some States non-Congress Ministries were formed, this practice was not strictly followed. For instance, in West Bengal "there was a protest against the appointment of Mr Dharam Vira as Governor, but in spite of that protest he was appointed as Governor."[38] When the Central Government sent Dharam Vira on leave, under the pressure of the United Front Ministry, then the question of his successor cropped up again. The United Front Cabinet recommended a pannel of names for the post of a Governor in place of Dharam Vira, but the Prime Minister Mrs Gandhi refused to accept the suggestion.[39] Similarly, in Bihar Nityanand Kanungo was appointed Governor in 1967, against the wishes of the Mahamaya Prasad Sinha Ministry.[40] Even in Haryana, the Centre rejected the suggestion of Rao Birendra Singh the then Chief Minister, about the appointment of the Governor.[41] The appointment of a Governor against the wishes of the party in power in the State strains relations between the Centre and the States. It also affects relations between the Governor and the Ministry. It is because of this reason that the Central Government has been charged with using double standards in the appointment of Governors.[42] It will be proper to mention here

that Prof. K.T. Shah expressed his doubts in the Constituent Assembly that such a convention can grow in India.

There are, however, some persons who want "an end to the convention of appointing Governors in consultation with the State Governments,"[43] but the Administrative Reforms Commission does not agree with this view when it says that "As to the procedure for appointment, the present practice is that the Chief Minister is consulted before the selection of a Governor is finalised. There are some who argue that prior consultation with the Chief Minister should be done away with, because there is no constitutional obligation for such consultation to take place and what is more important, because a powerful Chief Minister tends under this arrangement to get a Governor for himself who is suitably docile. This argument finds support from the fact that the term of a Governor is five years, while Chief Ministers come and go according to political vicissitudes. Consultation with a person who happens to be the Chief Minister at the time that a vacancy occurs in the Governor's post does not, in this context, have much meaning. All these arguments notwithstanding, there is merit in consulting the Chief Minister beforehand, otherwise the Governor's delicate task would be rendered even more difficult. We do not, therefore, recommend a change in the present practice by which the Chief Minister is consulted. We would nevertheless stress that the primary responsibility to appoint competent and suitable men as Governors vests with the Centre and that consultation with the Chief Ministers must not be allowed to dilute this responsibility."[44]

The third argument in favour of the appointment by the President was that it will curb the separatist provincial tendencies.[45] But it is difficult to understand, how can this object be achieved by this method of the appointment of the Governor.

Hence, it can be said that the only points in favour of this method of the appointment are that it is less expensive, a representative of the minority can be appointed, it keeps the authority of the Central Government intact and an outsider can be appointed as a Governor.[46] But in spite of these advantages, there is a feeling that this method of appointment needs a change and time and again this demand has been made both inside and outside Parliament and following suggestions have been made in this connection :

(i) The Governor should be appointed only with the concurrence of the State Government.[47]

(ii) He should be appointed by the President from a panel of names approved by the Government of that State.[48]

(iii) He should be appointed by the President out of a panel of names prepared by the Central Government in consultation with the opposition at the Centre.[49]

(iv) The appointment of the Governors should be got approved from Parliament.[50]

(v) The Governor should be appointed by the President out of a panel of names recommended by President's Council consisting of ex-Judges of the Supreme Court.[51]

(vi) The Governors should be appointed by the President not in consultation with Ministers but on the advice of a high powered body.[52]

(vii) The President should exercise his discretion in the appointment of the Governors and he should not act on the advice of the Council of Ministers in this respect.[53]

(viii) The Governor of the State should be elected by the Legislatures of the State.[54]

(ix) He should be elected by an electoral College consisting of the members of the State Legislative Assembly, Legislative Council, wherever, it exists and the members of all the autonomous local bodies of the State.[55]

Out of these various suggestions which have been made, it seems that the suggestion made by K. Subba Rao is more sound. In the Lal Bahadur Memorial Lectures of Poona University on "Conflict between the Centre and States", he suggested that "the Governors should be appointed by the President not in consultation with Ministers but on the advice of a high powered body...and he should be removable only on the basis of a verdict of misconduct pronounced by the Supreme Court. A Governor so removed should not be eligible for any Central, State Government position."[56]

QUALIFICATIONS FOR APPOINTMENT

According to article 157 of the Constitution, no person is "eligible for appointment as Governor unless he is a citizen of India and has completed the age of thirty-five years." Besides this "the Governor shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule, and if a member of either House of Parliament or of a House of the Legislature of any such State be appointed Governor, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as Governor."[57] Moreover, the Governor cannot hold any other office of profit.[58]

TERM OF OFFICE

According to article 156 of the Constitution, the Governor holds office during the pleasure of the President. He may, however, by writing under his hand and addressed to the President, resign his office. Subject to the conditions mentioned above, the Governor holds office for a term of five years from the date on which he enters upon his office, provided that the Governor shall notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office. It means, the Governor can continue in office beyond five years[59] and B.N. Chakravarti, the Governor of Haryana and Dr D.C. Pavate, the Governor of Punjab continued to hold office in spite of the fact that their term of office had expired because the Union Government did not appoint their successors. But some of the constitutional experts feel that "this proviso was not intended for the purpose for which the Union Government is using it now. Its purpose was to provide for certain exigencies such as delays in the swearing in of a new Governor."[60] This contention is supported by the fact that there is a similar provision even in the case of the President under article 56(C) of the Constitution but in spite of that the election of the President has to be held before his term expires.[61] Hanumanthaiya agrees with this view when he says that: "The Constitution fixes five years as the term and it does not give latitude even to the Government either to extend or to curtail it. The proviso merely provides for as they say, joining time. It may be one week or a few weeks by the time the other Governor

takes over charge ..I have all the time pleaded with the previous Prime Minister (Nehru) that it was wrong, it is unconstitutional to continue Governors after their term of five years. If he so desires, if he is fond of a particular individual, he can give him another term in another state or even in the same state."[62] He considers extension on yearly basis as undignified and unconstitutional, which seems to be right. Hence the Governor should be appointed well in time so that the newly appointed Governor may enter upon his office on due date. In case, if there is a sudden and unexpected vacancy in the office of the Governor and if the President needs some time to find a suitable person, then under article 160 of the Constitution he can make such arrangements as he thinks fit for the discharge of his functions. Under this article he can make even a temporary appointment when the Governor goes on leave as was done in West Bengal in case of Dharam Vira.

It will not be out of place to mention here that in the Draft Constitution it was provided that the Governor would be eligible for reappointment to that office only once[63] but subsequently this restriction was removed and now technically speaking a person can be appointed as a Governor any number of times.[64]

When article 156 of the Constitution was being discussed in the Constituent Assembly, Prof. Shibban Lal Saksena expressed the fear that if the Governor holds office during the pleasure of the President, it would make his position very weak and will take away his independence.[65] He, therefore, moved that the Governor may, for violation of the Constitution, be removed from office by impeachment[66] in the manner provided in article 137 of the Draft Constitution.[67] But this suggestion was rejected by the Constituent Assembly because Dr Ambedkar did not agree with it.[68] Since the Governor holds office during the pleasure of the President, it has made his position very weak because now he can be removed at the whims of the Central Government. The insecurity of tenure of office and dependence on the powers that be, made the office of the Governor subject to pressures and doubts. According to Dr L.M. Singhvi "the office had now become a constitutional blind alley."[69] Hence, A.K. Sen has suggested that "the condition of appointment must also be laid down and assure a fixity of tenure so that the Governor was not under constant threat of removal by the Central Government. The procedure

must ensure that a Governor should normally be allowed to function for five years unless there were overwhelming reasons for removing him."[70] K. Subba Rao, the former Chief Justice of India, agrees with this view when he says that the Governor should not hold office during the pleasure of the President, if he is to perform his functions in accordance with the provisions of the Constitution.[71]

But merely having a fixed tenure will not make the office of the Governor independent enough to perform his duties as a constitutional head. More than the powers of the President to cut short their period of office it is the possibility of extension in the same State for a future period or of appointment to another State, which has demoralised this office more than any thing else. Dr Ram Subhag Singh seems to be right when he says that "the Governors were being bribed by extending their terms and thus forced to work for the objectives of the ruling party."[72]

Governors till further orders or on a six-month basis like ordinary civil servants are a menace to our constitutional system and it is unfortunate that our Central Government has no consistent policy in this respect because some of the Governors have been given more than two terms,[73] whereas others have been given extension on six-monthly or yearly basis and still others were retired on the due date and were asked to hand over their charge to the Chief Justice of the High Court,[74] which by itself is most objectionable. Hence, it is suggested that the Governor should be appointed for a fixed tenure of one term only with no further extension. The P.V. Rajamanar Committee consisting of himself (former Chief Justice of Madras), P. Chandra Reddy (former Chief Justice of Andhra) and Dr A.L. Mudaliar, recommended that "the Governor should be ineligible for a second term in office as Governor."[75] K. Santhanam strongly condemns the practice of extending or renewing the terms of Governors. To reduce a Governor to the status of a civil servant is altogether wrong. The appointment of his successor should be announced before the expiry of his term and the method of his removal should be prescribed by the constitution which should be the same as in the case of the judges of the Supreme Court. Besides this, after his appointment as Governor, he should not be transferred from one state to another like a civil servant.[76]

OATH OR AFFIRMATION

"Every Governor and every person discharging the functions of the Governor shall, before entering upon his office, make and subscribe in the presence of the Chief Justice of the High Court exercising jurisdiction in relation to the State, or, in his absence, the senior most judge of that court available, in the following form, that is to say—

"I, A, B, do swear in the name of God that I will
solemnly affirm
faithfully execute the office of the Governor (or discharge the functions of the Governor) of.....(Name of the State) and will to the best of my ability preserve, protect and defend the Constitution and the Law and that I will devote myself to the service and well being of the people of... .....(Name of the State)."[77]

The form of oath prescribed in this article shows that one may either swear in the name of God or may solemnly affirm. The arrangements to solemnly affirm has been made for those who have no faith in God. "No person should be compelled to swear in the name of God if he does not want to do so."[78] In the words of S.S. More, "taking of oath involves belief in God. Members, who are not Christians or who have no faith in any God, cannot, consistently with their conscience, take the oath. In the United Kingdom such members had to wage a long struggle in order to get the right of making an affirmation instead of taking the oath. Charles Bradlaugh was the foremost of such fighters. Eventually members, who stated, either they have no religious belief or that the taking of an oath is contrary to their religious belief, were permitted to make solemn affirmation in lieu of oath."[79]

Before independence, the Indians had been solemnly affirming instead of taking oath.[80] "It may, however, be asked as to why *a provision of taking oath has been made when in the past, the Indian never used it? The only justification seems to be that to* take an oath in the name of God is to take an oath in the name 'Truth' and affirmation is merely a formal declaration which is a matter of expediency only. When India was ruled by the foreigners it was proper to affirm solemnly but after independence it is much more appropriate to swear in the name of God, except for those,

of course, who either do not have a religious belief or are not allowed to take oath by their religion. Though most of the people in India have faith in God, yet a provision had to be made even for those who have no such faith, however, small their number might be. This in a way, reflects the secular character of the Indian polity."[81]

There was an interesting discussion in the Constituent Assembly on the point whether the expression 'solemnly affirm' should be above the line or below. Dr Ambedkar said that "the reason why we have thought it desirable to place affirmation first and oath afterwards, was because in this country, at any rate, the Hindu when he is called upon in any court of law to give evidence, generally begins by an affirmation. It is only Christians, Anglo Indians and Muslims who swear. The Hindus do not like to utter the name of God. I, therefore, thought that in a matter of this sort, one ought to respect the sentiments and practice of the majority community, and consequently we have introduced this particular method by stating the positions as to affirmation and oath."[82]

Opposing this Mahavir Tyagi said that the expression "Swear in the name of God" should be above the line, and solemn affirmation below because[83] "God is Truth and affirmation is expediency sublimated." It was because of the insistence of Mahavir Tyagi and H.V. Kamath that the phrase 'Swear in the name of God' was placed above the line and 'solemn affirmation' below.

When the Governor is transferred from one State to another he has to take a fresh oath of office,[84] because under article 159, the oath has to be administered by the Chief Justice or in his absence by the senior most Judge of the High Court exercising the jurisdiction in relation *to that State* and the Governor also has to swear in the name of God or solemnly affirm that he will exercise the functions and serve the people of *that particular State. It may be mentioned here that there are many examples where the Governors have been transferred from one State to another.* To mention a few cases, for instance, Dharam Vira was transferred from West Bengal to Mysore, Ujjal Singh was transferred from Punjab to Tamil Nadu and Pattom Thanu Pillai was transferred from Punjab to Andhra Pradesh (1964), V.V. Giri was transferred from U.P. to Kerala (1961), Rama Krishna Rao from Kerala to

U.P., S.M. Shrinagesh from Andhra to Mysore (1964) and Jaychamraja Wadiyar Bahadur from Mysore to Madras (1964) and Jogindra Singh from Orissa to Rajasthan. It may also be mentioned here that when Dharam Vira took the oath of office in Calcutta, he was given a seventeen Gun Salute.[85]

EMOLUMENTS

According to article 158 (3) the Governor is "entitled without payment of rent to the use of official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the second schedule.

((3-A) where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine).[86]

(4) The emoluments and allowances of the Governor shall not be diminished during his term of office."

In the Draft Constitution it was provided that "the emoluments and allowances of the Governor will be such as may be determined by the Legislature of the State by law, until provision in that behalf is so made, such emoluments and allowances as are specified in the second schedule."[87] But when this matter was discussed in the Constituent Assembly it was felt that if the emoluments are to be fixed by a law passed by the State Legislature, then the different Governors may get different salary in different States. Hence, in order to ensure uniformity in this respect, the power to determine the salary of the Governor has been given to the Parliament. Since Parliament has not made any law so far, in this respect, hence, the Governors get Rs 5,500 per mensem as specified in the Second Schedule. But this allowance is not a true indicator of the real expenses which a State has to incur in order to maintain the institution of the Governor because the annual expenditure on the maintenance of huge official residences, including staff quarters and gardens, official railway saloons, river craft and aircraft, travelling and leave allowances and expenses on renewals and furnishings is enormous. For instance, "the allowance for renewals of furnishings for the Government House at Guindy and Octacamund in Tamil Nadu is Rs 70,000,

It is Rs 1,13,000 for Government Houses in Bombay and Ganeshkind; Rs 87,500 for those in Calcutta and Darjeeling; Rs 93,000 for those at Lucknow, Allahabad and Nainital in UP, Rs 50,900 for Patna and Ranchi (Bihar); Rs 40,000 for Shillong Raj Bhavan and Rs 46,000 for the Orissa Governor's residence at Bhubaneshwar and Puri."[88]

Besides this the Governor "is also given substantial grants to keep up his style of living. The Governor of Tamil Nadu gets Rs 3,20,000 for entertainment, maintenance of cars, staff and tour expenses. The Governor of Maharashtra is allotted Rs 5,00,000 and West Bengal Governor Rs 3,70,000. In UP the Governor gets about Rs 3,00,000; in Punjab Rs 2,03,000; in Bihar Rs 1,94,000; in Assam Rs 1,70,000; in Orissa Rs 1,53,000; in Andhra Pradesh Rs 2,73,000; in Kerala Rs 1,67,000; in Madhya Pradesh Rs 2,16,000; in Mysore Rs 2,55,000; and in Rajasthan Rs 2,05,000."[89]

In addition to these allowances and grants "the Governor also gets substantial amounts to be spent on gardens, electricity, and water, which in the case of Tamil Nadu Governor totals Rs 3,35,000. The Maharashtra Governor gets Rs 6,50,000 on this account. The West Bengal Governor gets Rs 5,90,000. Those in UP, Bihar, Kerala and Mysore get less than half as much."[90] Moreover, "no custom duties are levied on imported articles for personal use, wear or consumption by the Governor or any member of his family. Duties are also not levied on food, drink and Tobacco for consumption by the members of the Governor's Household or by his guests, whether official or otherwise. No duties are levied on the articles meant for furnishing the Governor's residences and Motor Cars provided for his use."[91]

After the States reorganisation, initial grants sanctioned for the furnishing of new official residences for the Governors of Kerala, Punjab, Madhya Pradesh and Rajasthan were Rs 90,000; 1,00,000; 1,10,000 and 1,25,000 respectively. For the Governor of Jammu and Kashmir the total amount allotted per year on sumptuary allowance, staff, household and tour expenses is Rs 2,35,000."[92]

This shows that the institution of the Governor, is in fact very expensive. This institution sometimes becomes still more expensive when a Governor goes on a long leave of absence and when in his place somebody else is appointed as a Governor as it happened in West Bengal. When Dharam Vira went on leave,

S.S. Dhavan was appointed as Governor and the State had to pay the salary of two Governors. It is interesting to know that according to Sri Prakasa who was Governor for more than ten years, the Governor can go on leave either when he goes abroad or when he is critically ill. He writes that when his parents were ill Dr Rajendra Prasad wanted that he should be given leave so that he could be by the side of his parents. "He got the law examined and found that the Governor could go on leave either when he went abroad for health reasons or was entirely incapacitated for work. I could avail myself of neither of these situations. So I remained where I was, making innumerable journeys to Benaras from Madras and Bombay."[93] According to the Administrative Reforms Commission, about six and a half lakhs of rupees per year is spent on a Governor.[94] In UP the expenses on the Governor are the highest because it costs about 15.1 lakh rupees a year.[95]

In all about three crores of rupees are spent every year on the Governors[96] and there is a lot of criticism by the public that the amount spent on the institution of the Governor is too much. As a result thereof, the Prime Minister has addressed the communication to all Governors drawing their attention to the public criticism against "luxurious expenditure in Raj Bhavans."[97]

IMMUNITIES

Besides this the Constitution has given certain immunities and privileges to the Governor which are mentioned in Article 361 of the Constitution:

(1) The Governor shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of powers and duties provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the Governor of a State, in any court during his term of office,

(3) No process for the arrest or imprisonment of the Governor of a State shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as Governor of such State, until the expiration of two months after notice in writing has been delivered to the Governor—or left at his office stating the nature of the proceedings, the cause of action thereof, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

Now adverting to article 361 of the Constitution it appears upon an analysis of this article that "the Governor is not answerable to any court for the exercise and performance of the powers and duties of his office. In other words, no court can compel the Governor to exercise any power or to perform any duty, nor can a Court compel him to forbear from exercising his power or performance of the duties. He is not amenable to the mandate or writs or directions issued by any court. These words are wide enough to bar any interference by the Court in respect of the official acts or omissions of the Governor. But the framers of the Constitution have taken the precaution of using additional words in the article with a view to extend the protection even in respect of acts or omissions which can be said to be incidental to the exercise of the power and performance of the duties of the office of the Governor. Consequently, the article affords immunity not only in respect of the exercise and performance of the powers and duties of the office but also in respect of "any act done or purporting to be done by him" in the exercise and performance of those powers and duties. These words "for any act done etc." are commonly used in provisions of statutes having for their object the creation of absolute or partial bar of interference by courts in respect of certain acts done or purported to be done under such statutes.

A comparison of Clause 1 of the Article 361 with Clause 4 thereof, makes it clear that in respect of official acts an absolute

bar is created but in respect of acts done in personal capacity a partial bar in the shape of notice for a period of two months prior to institution of civil proceedings is imposed, similar to that to be found in Section 80, CPC or Section 198 Sea Customs Act and various other Statutes."[98]

Here, it may also be stated that in "Article 361 the words "purporting to be done" are of very wide application and even though the act done is outside or in contravention of the Constitution, it comes within the protection of Article 361, if the act is professed to be done in pursuance of the Constitution. If the act is ostensibly done in the exercise of the power given under the Constitution and it is not established that the act is done dishonestly or in bad faith or in other words, out of any improper motive, the immunity attaches to the exercise of the power. The protection is intended to be real not illusory."[99] The Madhya Pradesh[100] and Nagpur[101] High Courts have also agreed with this view.

But the immunity does not extend to the exercise and performance of the powers and duties conferred on the Governor under any Act, not in his capacity as Governor but in a different capacity held by him by virtue of his office as Governor. The powers and duties so conferred are not the powers and duties of the office of the Governor. They are the powers and duties of different offices which the Governor holds by virtue of his office as Governor. For instance, there is no such immunity for the actions done by him as a Chancellor of the University. According to Jabalpur High Court the Governor cannot "claim any qualified immunity enjoyed by him under clause (4), in respect of the acts done by him as Chancellor of the Jabalpur University. The immunity that is given to the Governor under clause (4) is "in respect of any act done or purporting to be done by him in his personal capacity", "Personal Capacity" means no more than "Private Capacity", it does not import 'public capacity' also. The act of a person of accepting the office of Governor is undoubtedly an act done in his personal capacity. So also, his becoming a Chancellor may be an act done by him in his personal capacity. But after the acceptance of the office his acts as Chancellor are no more acts done by him in personal capacity than are his acts as a Governor. The acts of the Chancellor or of the Governor derive their effectiveness from the Title of the person to the

office. It is in his capacity as Chancellor and not in his personal capacity that the Chancellor is able to give legal effectiveness to his acts as Chancellor and acquire rights or incur obligations in that capacity. There is thus clear cut distinction between the personal capacity of an individual and the public capacity he has when he holds a public office such as the Chancellor of University.[102]

WARRANT OF PRECEDENCE

During the British days the Governors enjoyed a higher position in warrant of precedence and in the formalities of protocol as compared to the executive Councillor and as a result thereof even in the initial stages of our independence, they enjoyed this position because the Central Ministers took the place of the "old executive Councillors of the Viceroy whose place in the warrant of precedence was below that of the Governors. The Prime Minister (Nehru) however, decreed that the Governors except in their own States, were lower than the Central Cabinet Ministers."[103] Though the Governors made a representation "at the Governors' Conference Table that their position should be higher than the Central Ministers in the warrant of precedence and if they are not put above then they should at least be on the same level as the Central Ministers, the highest authority in the land, however, laid it down that as the Central Cabinet was the Cabinet of the land, its members are higher than the Governors."[104]

RULES FOR STATE MOURNING

"Ordinarily there will be no State mourning and funeral except on the death of the President, the Prime Minister, a former President or a Governor, according to a revised instruction issued by the Home Ministry. The mourning period will be 13 days in the case of the President, 12 days for the Prime Minister and seven days for a former President. It will not exceed seven days for a Governor or a Chief Minister...Flags will be flown at half mast throughout the country only on the death of the President, the Vice-President and the Prime Minister. In case of a Union Minister the half masting would be in Delhi and State Capitals and only in Delhi in case of the Lok Sabha Speaker, the Chief Justice of India and a Union Deputy or Minister of State. State-wide half masting is suggested in case of Governors, Lt. Governors

II

Appointment of a Chief Minister

QUALIFICATONS FOR APPOINTMENT

According to Article 163 (1) of the Constitution, "there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion," and according to Article 164(1), "the Chief Minister shall be appointed by the Governor and other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor."

It may, however, be asked at how far is it possible for the Governor to appoint such a person as a Chief Minister who is not a member of the State Legislature. According to one school of thought, it is not mandatory on the part of the Governor to appoint a Chief Minister from the members of the State Legislature alone.[1] Any person can be appointed as a Chief Minister for a period of six months provided that he is likely to carry the majority of the Legislative Assembly with him. If, however, the Chief Minister who is not a member of the State Legislature wants to continue in office for more than six months, he will have to be its member because "a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister."[2]

According to the other school of thought, in certain cases the Governor cannot appoint any person as a Chief Minister unless he is a member of the State Legislature. This is the opinion of the Advocate General of Bihar,[3] on the basis of which the Governor Ananthasayanam Ayyangar wrote the following letter to B.P. Mandal, who requested him to appoint him as a Chief

Minister : "I have since obtained the opinion of the Advocate General regarding your claim to become the Chief Minister or even a Minister. He states that you are not qualified to be a Minister without becoming a member of the Legislature. In view of the Constitutional position explained in my letter and the opinion of the Advocate General, I feel it difficult to accede to your request to form the Government in the State."[1]

This letter of the Governor of Bihar has raised a point of great constitutional importance, that is, what are those situations when it would be unconstitutional for the Governor to appoint such a person as a Chief Minister who is not a member of the State Legislature. It is very difficult to understand how the Advocate General or the Governor could say that B.P. Mandal was not qualified "...to become ...even a Minister" without becoming a member of the State Legislature, particularly when B.P. Mandal was a Minister a few days before, without being a member of the State Legislature. So far as the Ministers are concerned, there is absolutely no doubt that at the time of their appointment it is not necessary that they should be members of the State Legislature.[5] But what about the Chief Ministers? It is significant to note that the expressions "Ministers" in Article 163(3), "the Ministers" and "of Ministers" in Clauses (1) and (5) of Article 164, mean Ministers including the Chief Minister. The non-acceptance of this interpretation would mean that :

(i) the Chief Minister does not hold office during the pleasure of the Governor ;

(ii) the advice given by the Chief Minister, can be inquired into in any Court ;

(iii) there is no provision for the fixation of the salary of the Chief Minister in the Constitution ; and

(iv) the Chief Minister, may not be a member of the State Legislature for any unspecified time because the condition that if a Minister is not a member of the State Legislature for six months will have to resign, will apply only to the Ministers and not to the Chief Minister.

Hence, the expressions "Ministers" "the Ministers" and "of Ministers" used in Articles 163 and 164 include the Chief Minister. But what does the expression "A Minister" as used in Clause (4) of Article 164 mean? Does it cover the Chief Minister? If this expression includes the Chief Minister, then there should be no

difficulty in appointing such a person as Chief Minister who is not a member of the State Legislature. Since the expression "A Minister" in Clause (3) of the same article undoubtedly includes the Chief Minister, hence the expression "A Minister" in Clause (4) also includes the Chief Minister. Had this expression not included the Chief Minister, there would have been a separate provision in the Constitution for administering the oath of office and secrecy to him. This contention has been upheld by the Allahabad High Court in Harsharan Verma Vs Chander Bhan Gupta.[6]

Whether a person who is not a member of the State Legislature can be appointed as a Chief Minister or not was again contested before the Allahabad High Court in Harnam Sharan Verma Vs Tribhuvan Narain Singh, Chief Minister; U.P. in civil appeal No. 2205 of 1970, D/16.3.1971. The appellant filed a petition in the High Court challenging this appointment on the ground that the Constitution did not permit a person who was not a member of the Legislature being appointed as a Chief Minister. The High Court again dismissed the petition on the ground that the Constitution did not prescribe any qualification for the person to be selected by the Governor as Chief Minister or a Minister and hence there was no force in the appeal.[7] The appellant filed an appeal in the Supreme Court against the decision of the Allahabad High Court and the Supreme Court held that "appointment of a person as Chief Minister cannot be challenged on the ground that he was not a member of either House of Legislature of the State at the time of his appointment."[8] It is significant to note that while coming to this decision the Constituent Assembly Debates were taken into account.[9] The Madras High Court has also held that if the Governor has a discretion in the appointment of the Chief Minister and "we have grave doubts whether that action can be the subject-matter of any petition in a court of law."[10]

It is really very strange that the Advocate General of Bihar gave this opinion particularly when the Madras and Allahabad High Courts had already given a decision in this respect as far back as 1953 and 1962 respectively. It seems that the Bihar Advocate General gave this opinion in the case of B.P. Mandal because he has already been a Minister for almost six months without becoming a member of the State Legislature and the question was whether he can be appointed as a Chief Minister

without becoming a member of the State Legislature after he has ceased to be Minister under Article 164 (4) of the Constitution. On this point there are two conflicting opinions. According to one school of thought when a person has been a Minister for a period of six months without becoming a member of the State Legislature he cannot be appointed again as a Minister even if he has ceased to be so for some time, unless he becomes a member of the Legislature. This school of thought feels that it will be against the spirit of the Constitution if such a person is appointed as a Minister after a few days of his resignation because in this way one can remain a Minister for an unspecified period by resigning after every six months without becoming a member of the State Legislature and so on. Hence, this school of thought is of the opinion that when a person has remained a Minister for six months without becoming a member, he cannot be appointed as a Minister again unless he becomes a member of the State Legislature. M.C. Setalvad agrees with this view.[11]

The other school of thought, however, does not agree with this view. This school of thought is of the opinion that if a person once resigns after remaining a Minister without being a member of the State Legislature, he can be appointed again for another six months even without becoming its member because under Article 164 (4) he has to cease to be a Minister once and when he has ceased to be a Minister once, there is no further bar under this Article that he cannot be appointed as a Minister without becoming the member of the Legislature. Ashoke Sen, the former Law Minister, Government of India, agrees with this view.[12] This point of view seems to be more sound because when once he has ceased to be a Minister, he fulfills the condition laid down by Article 164 (4) of the Constitution. For instance, under Article 356 (3) when the President issues proclamation imposing the President's rule, it has to be laid before each House of Parliament and it ceases to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. If a Proclamation under Article 356 can be reissued after the expiration of two months, even without placing it on the table of Parliament[13] as required by Article 356 (3) of the Constitution, then why should the Chief Minister or a Minister be not appointed again when he resigns after being a Minister for six months without becoming

the member of the State Legislature. It may also be mentioned here that even the Ordinance can be reissued after it has ceased once. Hence, it seems that a person when he has ceased to be a Minister once, can be reappointed as a Minister for another six months even without becoming member of the State Legislature.

This contention is further supported by the language of Article 164 (4) itself. This Article for instance says that a "Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be Minister." Unless the word 'Legislature' means only the Legislative Assembly, which it certainly does not mean particularly in a bi-cameral Legislature, it will lead to absurdity of interpretion in the sense that if a person has been a Minister for any period of six consecutive months without becoming a member of the Legislature will never be appointed as a Minister, say even after three years of his ceasing to be a Minister unless', he becomes the member of the State Legislature because this Article does not specify the time limit as to how long, he will not be a Minister without becoming the member of the State Legislature.

Hence, from the constitutional point of view, there seems to be no legal bar in appointing such a person as a Minister or a Chief Minister and the contention of the Governor of Bihar that B.P. Mandal cannot be appointed as a Chief Minister unless he becomes the member of the State Legislature cannot be accepted.

However, it is expected that ordinarily the Chief Minister would be a member of the State Legislature. In this respect it should also be noted that even the Governors Committee appointed by the President recommended that "The Committee is opposed to non-Legislators or nominated members being chosen leaders and becoming Chief Ministers."[14] But it seems that this recommendation of the Governors Committee has been put in a cold storage because after the submission of this report persons who were not members of the State Legislatures have been appointed as the Chief Ministers of Mysore, Gujarat, Orissa, Madhya Pradesh and West Bengal.

About the appointment of the Chief Minister it should also be noted that there are instances where the Governor nominated a person on his own, without any recommendation and then appointed him as a Chief Minister. For instance, in Madras in

1952, the then Governor Sri Prakasa nominated C. Rajagopalachari to the Legislative Council and then invited him to form the Government.[15] Similarly in Bihar B.P. Mandal, a nominated member of the Legislative Council was appointed as a Chief Minister but in this case, the nomination was made on the recommendation of the ad-interim Chief Minister Mr Satish Prasad Singh. Even in UP the Chief Minister, C.B. Gupta got himself nominated as a member of the Legislative Council in 1961.[16] About the appointment of nominated persons as Chief Ministers, Sri Prakasa, who has been a Governor in three States, says that "I, for one, see no reason why Chief and other important Ministers should necessarily be members of the Lower House and not the Upper. I do not think we need follow the conventions of the British Constitution at all in this regard."[17] But there are persons who are of the opinion that even the elected members of the Upper Houses, not to speak of the nominated members should not be appointed as Chief Ministers. For instance H. V. Kamath introduced a Bill in the Parliament that the Prime Minister should be a member of Lok Sabha and the Chief Minister that of the Legislative Assembly[18] but the Bill was rejected.[19] But now this provision has been included in the Constitution (thirty-second) Amendment Bill introduced on May 16, 1973.[20] It should, however, be remembered that at the Centre, since 1950, a nominated member of Parliament has never been appointed as a Minister.[21]

APPOINTMENT OF THE CHIEF MINISTER WHEN ONE OF THE PARTIES HAS A MAJORITY IN THE ASSEMBLY

It may, however, be asked how much discretion the Governor has in the appointment of the Chief Minister. The Governor has to perform the constitutional duty of appointing Chief Minister either immediately after the elections, or when the Chief Minister resigns because of his defeat in the House or when the Chief Minister instead of facing the Assembly resigns because of defections in his party or when the Governor has dismissed a Ministry because it was not prepared to face the Assembly in spite of the fact that it has lost the confidence of the House or when the Chief Minister either dies in office or resigns because of ill health or on other political grounds. Immediately after the elections, if one of the political parties has a clear cut majority in the Assembly and if it

has also a clearly recognised leader, the Governor has no say in the appointment of the Chief Minister.

APPOINTMENT OF THE CHIEF MINISTER WHEN NONE OF THE PARTIES HAS A MAJORITY IN THE ASSEMBLY

Principles of Assessment: But when none of the political parties has a clear majority in the Legislative Assembly, the Governor may play quite an important part in the appointment of the Chief Minister. What should the Governor do, in such a fluid situation? On this point the Constitution is silent and the Governors, too, have followed different policies in different States and these policies are mainly of the two types, namely, some of the Governors have assessed the following of the different claimants in the Legislative Assembly and after assessing the claims and counter claims, they have invited the leader, who according to them commands the majority in the Assembly, whereas, there have been some Governors who have invited the leader of the largest party in the Assembly to form the Government without assessing the claims or counter claims. The principle that the Governor should assess the following of the various contenders for the office of the Chief Minister, before inviting him to form the Government has also been recommended by the Governors Committee which was appointed by the President in November 1970. This committee recommended that "the leader of the largest single party in the Assembly (when no party has an absolute majority) has for that reason alone no absolute right to claim that he should be entrusted with the task of forming a Government to the exclusion of others. The relevant test for a Governor is not a size of the party but its ability to command the support of the majority in the Legislature. The Governor has first and essentially to satisfy himself that the person whom he invites to form the Government commands majority support in the Legislature."[22]

Here it should also be noted that after the election of 1967 in West Bengal and Bihar, though the Congress party was the largest, yet its leaders were not invited to form the Government. One of the reasons for this may be that in these States the opposition was more united and the Congress party was not in a position to form the Government, otherwise like UP and

Rajasthan, the Congress party perhaps would have formed the Government even in these States.

The Governors Committee has gone even to the extent of recommending that "the leader of the party which is in a minority in the Assembly may also be invited to form a Government without that party necessarily entering into a combination with other parties provided the Governor is satisfied that such a minority party leader would be able to command the support of other parties in the Assembly for its policies."[23] It is a recommendation in favour of the minority government of the type which existed at the Centre after the Congress split. This view has been supported by Mehar Chand Mahajan, the former Chief Justice of India. He, for instance, said that the Governor's duty was to "choose a person who in his opinion can form a stable Government and then leave him to face the Legislature. He is not bound to invite the leader of the largest party."[24] H.M. Seervai, an eminent jurist and at present Advocate General of Maharashtra,[25] M.C. Setalvad, the former Attorney-General of India[26] and A.K. Sarkar, another former Chief Justice of India also agree with this view. A.K. Sarkar says that "the Governor should make endeavours to appoint a person who has been found by him, as a result of his soundings, to be most likely to command a stable majority, in the Legislature."[27]

METHODS OF ASSESSMENT

It may, however, be asked in this connection as to how should the Governor assess the claims and counter claims of the various claimants to the office. For this purpose the Governors have employed the following three methods, namely :

1. List System.
2. Parade system or physical verification system.
3. List-cum-parade system.

In Bihar, after the imposition of the President's rule on June 29, 1968, when the mid-term poll was held, none of the political parties had an absolute majority,[28] but the Congress was the biggest party having the strength of 118 members. The leader of the Congress Party, Sardar Harihar Singh as well as the leader of the Triple Alliance (SSP, PSP, and Lok Tantrik Congress) both claimed majority and submitted the lists of their supporters.

Nityanand Kanungo, the then Governor invited Harihar Singh, the leader of the Congress party to form the Government without interviewing the members whose names appeared in both the lists.[29] It is an example of pure list system because in this case the majority was assessed purely on the basis of lists.

In Gujarat, in April 1971, Shriman Narayan, the then Governor, however, followed the principle of list-cum-physical verification. For instance, Hitendra Desai, who resigned on April 3, again staked his claim on April 5 and asserted that he had been able to enlist the unconditional support of 11 Swatantra members and three independents including one Jana Sangh member, raising the total strength of his party MLAs and the supporters to 95 in a House of 168 and gave the list. The Governor informed Hitendra Desai that his claim would be duly considered after he "had met the concerned Swatantra and independent members and verified from them personally whether they were really prepared to extend their unqualified support to the new Congress (O) Ministry."[30] Accordingly, he invited the Swatantra, Independent and Jana Sangh members to meet him. They did so and signed in his presence a solemn declaration that they would give unconditional support to the new Ministry headed by Hitendra Desai.[31] "A list of 81 Congress (O) members of the State Legislature was certified by the speaker...Thus Desai had the support of 93 M.L.A.s out of 164 members of the Assembly including the Speaker. It was on this basis that he had invited Hitendra Desai to form an alternative Ministry in the State."[32] This is an example of list-cum-physical verification.

Similarly in UP, after the General election of 1967, none of the political parties had a majority in the Assembly.[33] Both, C.B. Gupta, the leader of the Congress Legislature Party and Ram Chandra Vikal, the leader of the SVD claimed majority in the Legislative Assembly[34] and the problem before the Governor was as to who should be invited to form the Government. The Governor after considering the claims and counter claims, invited C.B. Gupta to form the Government. While justifying this step, Biswanath Das, the then Governor said that out of 37 independents, 27 were claimed by the SVD as its supporters, whereas the Congress claimed to have with it 19.[35] Explaining as to how the rival claims were settled, the Governor said that "he had first accepted the signed statements of three supporters of the Congress

not claimed by the Dal. After this the elected leaders of the two parties were then asked to produce before him members common to the list of both. Thirteen of them appeared before him and affirmed their support for the Congress. ...with these 16 supporters, Mr Das said, the Congress strength was assessed at 214 (a majority of four). Of the five members of other parties claimed by the Congress, three appeared before him and confirmed the claim. A fourth has given his support but did not give it to me in writing. While the fifth declined to give such support. Further there was a signed statement of support to the Congress by one independent and the nominated Anglo Indian. The Governor said that the Dal could not produce before him any independent members except the leader of the Dal (Mr Ram Chandra Vikal) in spite of many opportunities being given to the Dal."[36]

Similarly in Rajasthan also, immediately after the General election of 1967, none of the political parties had a clear cut majority in the Assembly.[37] Both, Mohan Lal Sukhadia, the leader of the Congress Legislature Party and Moharawal Lakshman Singh the leader of the Samyukta Dal claimed majority. Dr Sampurnanand assessed the claims and counter claims and interviewed 21 MLAs whose names appeared in both the lists. After that he invited Mohan Lal Sukhadia to form the Government and in his verdict the Governor said that "he had left the reported views of the 15 independent MLAs out of reckoning as they had no policy and no party or group."[38]

This shows that the Governors of Gujarat, UP and Rajasthan had followed the system of list-cum-physical verification. But the similarity ends here because while assessing the claims and counter claims, the Governors of UP and Gujarat had taken into account the independents whereas the Governor of Rajasthan has ignored them as if they did not matter. The Governor probably took this position because he wanted to favour the Congress Legislature party which was in fact, in a minority.[39] This incidentally shows that while making assessment, the Governors can favour a particular party, and hence he can play an important part in the appointment of the Chief Minister.

Sardar Hukam Singh who succeeded Dr Sampurnanand as the Governor of Rajasthan also followed the method of list-cum-physical verification in order to find out as to who has the majority. In the lists which were submitted by Mohan Lal

Sukhadia and Moharawal Lakshman Singh, there were 21 common names. The Governor interviewed them.[40] Similarly, in March 1970, in West Bengal the then Governor S.S. Dhavan was in favour of the list-cum-physical verification system. For instance, when Ajoy Mukherjee resigned on March 16, 1970, Jyoti Basu, the leader of the CPM, asked the Governor that he should be asked to form a government, but the Governor asked him for the list of his supporters and wanted to interview them, for which he was not ready. He said that he would prove his majority on the floor of the House and would not disclose names of his supporters. But the Governor told Basu that "unless the *prima facie* case established by other parties opposed to a marxist-led Ministry was demolished, the testing of the question of confidence in the Assembly would be a mere technicality," and he recommended President's rule.[41]

Some of the Governors on the other hand follow the method of parade system alone. For instance, in February 1969, D.C. Pavate the then Governor of Punjab said that he would "call the leader of whichever party says it has the majority to form the Government. I will like to count the heads though" he told the reporters.[42]

However, there are some of the Governors who do not like this identification parade system. For instance, B. Gopala Reddi, the Governor of UP made a statement in Kanpur that "he was inclined to put reliance on the claim of any party leader who submitted his list of 213 members as a prerequisite to claim majority in the Assembly. To a question: "What would be his attitude if any one challenged genuineness of the list?" He replied that he would use his discretion to assess it, but once he was satisfied that the challenge was not genuine, he would go in his own way."[43] He also said that "There was no necessity to parade the members."[44] He even went to the extent of saying that "it was not the business of the Governor to count heads of members belonging to various parties to ascertain claims of majority outside the House."[45] Similarly after the imposition of President's rule in Bihar in 1969, both the Congress and the non-Congress parties claimed a support of 170 members each in a house of 318 members. Mr Nityanand Kanungo, the then Governor, was asked if he would "resort to a parade of members figuring in the list of the rival claimants to power." Mr Kanungo said, "no, never."[46] According to K. Santhanam, "the practice of obtaining signatures

and parading members before the Governor is vulgar and objectionable."[47] This shows that the Governors have followed different methods of assessing the majority in the Assembly.

Principle of Non-Assessment: But according to the other school of thought, if immediately after the general elections none of the parties has a clear cut majority in the Assembly; then the Governor instead of assessing the claims and counter claims, should straight away summon the leader of the largest party to form the Government. For example, Sri Prakasa, who had been a Governor of three States—Assam, Madras, and Bombay (Maharashtra) for a period of 12 years says: "the Head of the State is perfectly within his rights—in fact it is his duty—to call, in these circumstances, the leader of the largest group to form the Government. If all other parties join together and defeat the Government, then and then only—can the Head of the State call the person whom these parties together may choose as their leaders—to take charge of the Government. The whole procedure is perfectly clear and constitutional and should be followed...I do not think a Governor can take into cognisance any new party that may be said to have been formed after the elections and before the Legislature meets. He can only accept the nomenclature of parties as they were given before the elections."[48]

In 1952 when he was the Governor of Madras, he invited Rajaji to head the Government because the Congress was the largest party having a strength of 155 in a House of 321. When all the opposition parties with 166 members joined and approached the Governor, he said: "I am not going to recognise the Combination of groups. I am going to call that party which in elections emerged as the largest single party, if not absolute majority party, the biggest party."[49] Similarly in Bihar when the Soshit Dal Ministry of B.P. Mandal resigned (it was a minority Government) Mahesh Prasad Sinha the leader of the Congress Party—which was the largest party, was invited by the Governor to form the Government and it was only after he had refused that Bhola Paswan Shastri was appointed as a Chief Minister.[50]

This observation of Sri Prakasa or we may call it Sri Prakasa Doctrine seems to be sound and is in accordance with the accepted principles of democracy and K. Subba Rao, the former Chief Justice of India agrees with this view.[51] The rejection of this principle would mean the acceptance of the fact that a person

should not be considered as having been elected unless he has received the majority of votes polled. But this is not a fact because a person who secures a relative majority, is declared elected in spite of the fact that the majority of the votes has been cast against him, which have been secured by his half a dozen rivals. Just as a person who is elected by a minority of total votes, is not discarded if his votes are in excess of the number of votes secured by any of his opponents, similarly, the Governors ordinarily should not bypass the largest group in the Legislature, even if it has no majority in the first instance.

In fact, it seems that this is the only way of avoiding undue interference of the Governor's in the formation of the Ministry. However, in such cases the Governor would be justified in asking the Chief Minister to face the Assembly within a short period to vindicate his position in the Assembly.[52] But unfortunately before 1967, the practice of inviting the leader of the largest party has been followed only when the Congress Party happened to be the largest[53] and not otherwise.[54]

After 1967, however this practice has somewhat changed in the sense that since then the leader of the Congress Party whenever it was the largest, has not been automatically invited to form the Government. The Governors, before doing so, have been assessing the situation whether the leader of the largest party is ni a position to form a stable government or not. If the Governor came to the conclusion, that he was not in a position to do so, the Governor did not automatically invite him to form the Government.[55] It may, however, be mentioned here that the Governors have applied different standards in different States in assessing the situation about the formation of a stable Government. For instance, in West Bengal when Ajoy Mukherjee resigned on March 16, 1970, Jyoti Basu, the leader of the CPM asked the Governor that he should be invited to form the Government. The Governor, however, asked him to submit a list of his supporters and wanted to interview them, for which he was not ready. He said that he would prove his majority on the floor of the House and would not disclose the names of his supporters. But the Governor told Basu that "unless the *prima facie* case established by other parties opposed to a Marxist led Ministry, was demolished the testing of the question of the confidence in the Assembly would be a mere technicality" and he recommended the imposition of the

President's rule. In Rajasthan, however, the Governor followed entirely a different policy in 1967. The Samyukta Vidhayak Dal had built up a case for a non-Congress government by submitting a list of 95 MLAs out of 183 who were later on produced before the President. The Governor, however, instead of asking Mohan Lal Sukhadia, the leader of the Congress party to demolish the claim of the opposition to form government as was done by the Governor of West Bengal, upheld his claim, by not counting 15 independent MLAs while deciding the question of majority as if their presence simply did not matter in the Assembly. Unfortunately when Mohan Lal Sukhadia refused to form the Government, even then, the Governor instead of inviting Moharawal Lakshman Singh, the leader of the Samyukta Vidhayak Dal to form the Government, recommended the imposition of the President's rule and the dissolution of the Assembly. On the Governor's recommendation, the President's rule was imposed, the Assembly, however, was not dissolved and kept in a state of suspended animation. This shows that whereas the Governor of West Bengal wanted that the CPM leader should demolish the case built by the parties opposed to a CPM led ministry, the Governor of Rajasthan instead of asking Mohan Lal Sukhadia to demolish the case built by Samyukta Vidhayak Dal, himself demolished the claim of Samyukta Vidhayak Dal while making assessment of the majority in the Assembly and got the President's rule imposed.[56]

It will not be out of place to mention here that the imposition or reimposition or continuance of the President's rule immediately after the elections under the pretext that a stable Government cannot be formed, is highly undemocratic, particularly when the largest party or a combination thereof which was formed before the elections is prepared to form the Government. While commenting on the reimposition of the President's rule in Kerala in 1965, R.K. Khadilkar, a veteran Congressman, said : "Constitutionally to my mind—let me be very frank, this looks dubious and it violates fundamentals of our Constitution—whose judgement is final in this matter—the judgement of the Government or that of the representatives of the people. That is the conflict. Let the elected representatives of the people meet and decide."[57]

It is, of course, a fact that there are certain situations when the claim of the leader of the largest group in the Assembly to form the Government, may be legitimately ignored. This may have to be

done when all the other groups combine to form a common United Front before the election and when such a United Front has a majority in the Legislative Assembly. The Governors Committee agreed with this view when it recommended that "if prior to a general election some parties combine on an agreed programme or an electoral understanding that if such a combination gets a majority they will form the Government, and if such a combination does secure a majority; the Governor may invite the commonly chosen leader of the combination to form the Government, because the electorate in returning such a combination to the Legislature in a majority had already prior knowledge that it would be called upon to form the Government. The Governor in inviting such a leader would be acting in accordance with the wishes of the electorate."[58]

It will not be out of place to mention here that such United Fronts were formed in Kerala by the non-Communist parties in 1960[59] and by the non-Congress parties in February 1967. In 1967, "though different groups fought under their own differing names, the non-Congress parties also gave themselves a second name of United Front as well. This was accepted by the Governor even if they were splinter groups, and when they jointly elected their leader, he was invited to form the Government regardless of what group was actually the largest after the elections."[60] A similar United Front was formed by the non-Congress parties in West Bengal in 1968, when the mid-term poll was held there. When the United Front won the majority, its leader was invited to form the Government, bypassing the claims of the leader of the Congress party which was the largest. This view has been accepted even by the Government of India. While speaking on the role of Dr Sampurnanand, the Governor of Rajasthan, Y.B. Chavan, the then Home Minister said : "if there was a pre-existing coalition—I am deliberately saying this—before the elections, if any party or a group of parties had decided to form a United Front, that is understandable. It is an accepted political device. The leader of such a United Front should form the Government."[61]

But what would happen if the United Front formed before the election, instead of having a clear majority in the Legislature, wins only the largest number of seats. Should its leader be invited to form the Government on the ground that he is the leader of the

largest front? Such a situation arose in West Bengal in 1971. President's rule was imposed there on March 30, 1970 and then the mid-term poll was held in March 1971. In these elections the ULF had won 123 seats in the Assembly and hence it was the largest group. On this basis Jyoti Basu wrote a letter to the Governor that as the leader of the largest single bloc of members in the House, he should be invited to form the Government. The Governor S.S. Dhavan said : "it was only if a State which was not under President's rule and Government of which was being administered within the provisions of the Constitution that the fact of being 'the largest single party' be taken as a *prima facie* evidence of the ability of the party to command a majority in the Assembly. In particular, if other parties write to the Governor alleging that the party or group concerned does not command a majority, the Governor will act improperly, if he makes a premature report to the President under Clause (a) without making proper inquiry."[62]

The Governor also wrote to Basu that as a Governor functioning under the President's rule he has no power to invite any party or group to form a Ministry so long as the proclamation is effective. He could only report to the President that the Proclamation might be withdrawn provided that he could state in his report that conditions exist under which Government of the State can be carried on in accordance with the Constitution. But how could he "make this statement to the President after several parties have written to him opposing your claim and their combined numerical strength is greater than that of the ULF led by you."[63] After assessing the situation, the Governor invited Ajoy Mukherjee, the leader of the Democratic coalition, consisting of the Congress, Muslim League, Bangla Congress, PSP and CPI to form the Government.[64] Hence, the Governor ignored the claim of the leader of the largest front which was formed before the election. It is very interesting to know that the Governor recognises the claim of the leader of the largest party or a combination of the parties formed before the election but only in a State "which was being administered within the provisions of the Constitution." By this expression, he means a State which is not under the President's rule. But it is difficult to understand, in what way the Constitutional obligations of the Governor when a State is under the President's rule and when it is not under the President's rule are different so far as the appointment of Chief Minister is concerned, particularly when the

elections have been held after the imposition of the President's rule.

Besides this, there may be another occasion which has been mentioned by late Mehar Chand Mahajan, when the claim of the leader of the largest party can be ignored. He, for instance, said that "if the party in power fails to obtain a majority, the Governor should treat it as a popular rejection and call upon the leader of the opposition to form a Ministry. In the event of his failure to do so, the leader of the largest political party should be invited."[65] M.C. Setalvad agrees with this view.[66]

But A.K. Sarkar another former Chief Justice of India does not agree with this principle and he "regards this interpretation of the electoral result as untenable. The fact that it held power before the polls, should not disqualify the largest single party. Such a party must be allowed to assume office if it gets support from any other party or independent members and with such support commands the majority in the Legislature."[67] Hence, according to A.K. Sarkar ordinarily, the claim of the leader of the largest party should not be bypassed in the first instance unless its leader declines the invitation. This principle was followed in Punjab after the general election of 1967. The claim of the Congress party which had the strength of 48 out of 104, was bypassed only when its leader Sardar Gian Singh Rarewala refused to form the Government. Rarewala said : "I accept that the majority is with the United Peoples Front."[68] This course of action was also followed by Biswanath Das, in UP,[69] and by Sampurnanand in Rajasthan[70] in 1967 but only after assessing the position of the independents. But this procedure of making assessment like astrologers, on the part of the Governors of UP and Rajasthan sets a highly dangerous precedent. The constitutional duty of the Governor is not to assess the situation but to invite the leader of the largest party and enquire, if he is in a position to form the Government. "If it is left to the Governor in the case of States or to the President in the case of Centre to decide if any elected party is capable of forming the Government then the democracy is a guided one."[71] K. Santhanam agreed with this view when he said that "it deserves to be emphasized that the Constitution does not require that before a Governor calls upon a person to become a Chief Minister and nominate his Council of Ministers, the Chief Minister should have the support of the Legislature. The

existence of such a majority is undoubtedly a great convenience but to make fetish of it and ask for signatures and the productions of the supporters in person is altogether foolish and undignified."[72]

This seems to be so because while offering the Chief Ministership in a multiple party system, if the principle of inviting the leader of the largest party or the leader of the largest front formed before the election is not followed, the Governor may also influence the Chief Minister designate in the appointment of other Ministers, about the distribution of portfolios among them or about certain policies to be followed. In fact, the Governor of West Bengal after the death of Dr B.C. Roy, the Chief Minister, made a mild attempt in the direction of laying down the policies to be followed by his successor when he "sent a message to the Council of Ministers to be read out by the Chief Minister. This message purported to summarise the basic principles of Dr Roy's policies and seemed to enjoin on the Sen Ministry to act on these principles. The Statement was given wide publicity."[73] The mere fact that the acting Chief Minister agreed to read the message of the Governor to the Council of Ministers amounts to the acceptance of the policies, to some extent as suggested by the Governor.

If the principle that, after the President's rule when the elections are held, the Governor must assess the situation is accepted, then it would open the floodgates of Governor's interference in the appointment of a Chief Minister when none of the political parties has a clear-cut majority. Hence, it seems that it would be much safer for a Parliamentary democracy in India that immediately after the elections, whether after the President's rule or otherwise, the leader of the largest party/coalition formed before elections should be invited to form the Government when none of the political parties has an absolute majority.

But unfortunately in certain cases the Governors have not followed this principle and in others the political leaders have reacted sharply when the Governors followed it. So long as this principle is not accepted the possibility of the Governors manoeuvring the appointment of the Chief Minister may not be completely ruled out.

WHEN SHOULD THE GOVERNOR ASSESS THE SITUATION ?

When it is said that the leader of the largest party or a united front (formed before elections) should be invited to form the Government even if it does not have an absolute majority, it does not mean that the Governor should never assess the situation. In fact, on certain occasions the assessment of the claims and counter claims by the Governor may be absolutely essential. For instance, think of a situation when President's rule has been imposed and the State Assembly has been kept in a state of suspended animation after the fall of various governments formed by the combinations of various political parties at one time or the other and in this process all the parties have been in the Government at one time or the other.[74] If after some time the President's rule is to be revoked, then the Governor will have no alternative but to assess the situation and he cannot ask the leader of the largest party to form the Government straight away because it is just possible that the President's rule might have been imposed after the fall of a Government headed by that party.[75] If the President's rule is to be revoked in such circumstances, the Governor is duty bound to assess the situation as to who has the majority and whether the formation of a Government is possible or not. It may, however, be asked in this connection as to whether the Governor should assess the claims and counter claims when after the resignation of the Chief Minister of a coalition Government, the President's rule has been imposed on the ground that the United Front failed to elect a leader in place of the out-going Chief Minister.[76] Such a situation developed in UP after the resignation of Charan Singh. The State Assembly was suspended because "in the Governor's view, a period of President's rule may help to reorient political affiliations in such a manner that a stable Government should be constituted within a reasonable time."[77] Here it should be remembered that it was the second fall of the Ministry. The Ministry headed by C.B. Gupta, the Congress leader, had already fallen. When on March 22, 1968, the SVD succeeded in electing Harish Chandra Singh as its leader unanimously, the dialogue of installing a popular Ministry was started again and he met the Governor and requested him that he may be invited to form the Government.[78] C.B. Gupta, the leader of the Congress party also

claimed the majority. What should the Governor do in such a situation? It seems that the proper course for the Governor would be to invite the leader of the SVD immediately if the Governor does not have any convincing proof of defections from the SVD. But if there are defections secret or otherwise and if the Governor has proof in writing under the signatures of defectors which are authentic, what should the Governor do in that case? Should he assess the situation or not. Such a situation cropped up in UP when after the resignation of Charan Singh some of the member of the SVD gave in writing secretly to the Governor, that they would support the Government headed by C.B. Gupta. Since the Governor, B. Gopala Reddy was in a fix what to do, hence, he wrote a letter to Harish Chandra Singh in which he said: "the only question that remains is about your majority which the SVD commanded while they were in office. From December 3, there was no occasion for the Government to show to the world their continuing majority. Ordinarily, in the absence of any evidence to the contrary, it must be presumed and correctly so that the Government continues to have a majority but if there is written evidence before the Governor to the contrary, can he ignore it and continue to presume that the Government has a majority behind it?"[79]

He also asked:

(1) "Whether the Governor can under the present circumstances install a Ministry without verifying the strength of the two parties when both claim majorities in the Assembly. If a majority is to be verified then what should be the mode of verifying it?"

(2) "Whether cognizance can be taken by the Governor of secret letters to him intimating defections from the majority party, the SVD, thus enabling the opposition, the Congress to claim a majority. These secret defections", Mr Reddy has said in a letter to the SVD leader "were in fact, the only reason for any doubt about the coalition's continued majority."

(3) "Whether a stable Government can be ensured so that the President can be advised to revoke his proclamation suspending the State Legislature."

Replying to the point raised by the Governor if he could ignore the written evidence that the party in power had lost its majority, Harish Chandra Singh said : "My categorical answer is yes.

Because if it were otherwise, a no-confidence motion against a Government could well be decided in the Speaker's office or Government House rather than in the Assembly."[80]

Moreover, he said, "every time the House is prorogued or adjourned it will open the way of filing documentary evidence of withdrawal of support of some members to the Government before the Governor and on that account to demand of the calling of a new government. It is significant to note that the Assembly has not been dissolved and is yet in existence. Therefore, the analogy of calling a leader after general elections does not apply."[81] He also requested the Governor that the names of the defectors be disclosed to him and when the Governor refused to do so, the SVD leader said that "the names of the Dal defectors could not be kept secret as the leader of their and the people of their constituencies had a right to know the correct positions. As a matter of fact any member of the SVD supporting the Congress must be deemed to have crossed the floor. Can the floor of the House be crossed at the residence of the Speaker or the Governor secretly without the knowledge of the party, the public in general or the electorate?"[82] It seems that there is a considerable weight in this argument and Shriman Narayan, the former Governor of Gujarat agrees with this view.[83] Hence, in a situation like this, the proper course of action on the part of the Governor would have been to invite Harish Chandra Singh as soon as he was elected by the SVD. The fresh assessment of the situation, every time there is a change in the SVD leadership, gives undue encouragement to defections.

In Madhya Pradesh, the Governor even went a step further in the sense, that in place of G.N. Singh, the SVD elected Raja Naresh Chandra Singh as leader and G.N. Singh while submitting the resignation of his Ministry advised the Governor to summon the new leader of the SVD to form the Government. But K.C. Reddy, the Governor "informed the leaders that he will like to make his own assessment before taking the next move. Meanwhile he asked the Rajmata to send him the proceedings, of the SVD last night, presumably to see if the Raja had the support of the various constituents of the SVD."[84] Now question arises as to how far was this action of the Governor proper and non-partisan particularly when the session was going on and because of the fact that K.C. Reddy was not prepared to invite the newly elected

leader of the SVD and as a result thereof the out-going Chief Minister was forced to recommend the prorogation of the session in which the budget was to be passed. It seems that this action of the Governor was highly improper because if the Governor had any doubt about the majority of the SVD, the same could have been tested on the floor of the House because the Assembly was in session. It seems strange that if Mohan Lal Sukhadia, the leader of the Congress Party in Rajasthan says that he has a majority, the Governor believes him and when he refuses to form the Government, he goes to the extent of recommending the imposition of President's rule, instead of giving a chance to the opposition to form the Government[85] but if G.N. Singh says that the SVD has a majority which could be tested on the floor of the House the very next day, it is not believed. "The Governor in fact inquired the party position from the Speaker and did not even grant interview to the Raja, the SVD leader for three days,"[86] because he said that he was indisposed but he is reported to have met D.P. Mishra, the Congress leader for thirty minutes. When a new leader has been elected and when it has been said by the out-going leader that it was an internal affair, it seems that there was no alternative for the Governor except to invite the new leader to form the Government. "In Madras, between 1946 and 1951, three Chief Ministers took office. The first Chief Minister was defeated in the party in 1947. An election was held within the party and a new leader was elected. The old leader immediately sent his resignation. Next day there was no proroguing or adjournment of the Assembly. Only a Gazette Extra-ordinary was issued early in the morning and the new leader took office. Two years later, the same thing happened...a new leader was elected. Again there was no proroguing and immediately he was accepted by the Governor. So this is what happened then. In this case, particularly after it was said that it was an internal affair, there was no constitutional question which should have bothered the Governor."[87] P. Venkatasubbiah while supporting this contention said that in Andhra when Sanjiva Reddy laid down the office of the Chief Minister, he advised the Governor that Brahmananda Reddy be appointed as a Chief Minister and he was so appointed in spite of the fact that Brahmananda Reddy had not yet been elected as a leader by the party members then.[88] Even in Assam, Madhya Pradesh and Rajasthan the Chief Ministers were replaced, P.C.

Sethi was appointed in place of Shyama Charan Shukla in Madhya Pradesh and Barkatullah Khan was appointed as Chief Minister in place of Mohan Lal Sukhadia in Rajasthan and this was considered as purely an internal matter. Similarly in Mysore when Nijalingappa was replaced by Virendra Patil, the Governor did not raise any objection.[89] Even in Bihar when Satish Prasad Singh, the Soshit Dal Chief Minister resigned and his place was taken by B.P. Mandal, the Governor did not make any fresh assessment in spite of the request of Mahamaya Prasad Sinha[90] and said that the proper form of deciding majority should be the floor of the House.[91]

While speaking on the role of the Governor of Madhya Pradesh P. Venkatasubbiah said that "Certain norms must be observed if Parliamentary democracy was to continue. The majority of the Ministry should always be tested in the Assembly as was recommended by the Speakers' Conference. While Mr Venkatasubbiah found in the Governor's action a serious violation of proprieties, Mr J.B. Kirpalani called it 'preposterous'.[92]

Hence, it can be concluded that the action of the Governor of Madhya Pradesh was highly objectionable because by not accepting the advice of G.N. Singh, the out-going Chief Minister, in this connection he wanted to decide the question of majority in the Raj Bhavan and not on the floor of the House when it was in session.

It may also be asked as to how far the Governor would be justified in asking about the policies and programmes of the SVD while assessing the claim of its majority. Ordinarily the Governor should not indulge in this field because to know the policies and programmes of the Government which he is going to instal, is not within his jurisdiction. But strangely enough some of the Governors even want such informations from the leaders of the SVD. For instance B. Gopala Reddy, the Governor of UP while assessing the majority wrote a letter to the leader of the SVD in which he asked whether:

(i) there are differences in the SVD;

(ii) the party is capable of implementing the programme it has announced particularly with reference to Taxation.[93]

Similarly, in January 1968 in Bihar, B.P. Mandal, the leader of the Soshit Dal was appointed as a Chief Minister because the leader of the Congress party assured the Governor that his party would support the Mandal Government. But after sometime the Government of B.P. Mandal fell and when Bhola Paswan Shastri was elected leader of the SVD, the leaders of all the constituent groups of SVD assured the Governor both in writing and by meeting him personally of their support to the Shastri Government but still the Governor asked that he would like to know their agreed programme but no such condition was imposed when Mandal was appointed as Chief Minister.[94]

This means that while assessing the majority, the Governor, if he so likes, may ask the combination of political parties about their policies and programmes including the intra-party relationship. But the questions of this type were never asked from a combination of parties when Congress party happened to be one of the constituents and this shows discriminatory treatment.

CONCEPT OF STABILITY AND THE APPOINTMENT OF THE CHIEF MINISTER

It may, however, be asked as to what is the role of the concept of a stable Government in the appointment of Chief Minister. As already mentioned that in certain situations the Governor has no alternative but to assess the claims of the majority of the different contenders to the office[95] but while doing so, should he also ensure that the Government which he is going to appoint should be stable? According to Nityanand Kanungo, the former Governor of Bihar: "the Governor has to exercise his political judgement in such matters and not permit formation of unstable Ministries which have a demoralising effect on the people and the administration."[96]

It was perhaps because of this reason that the Governors of some of the States did not permit the leader of the largest party to form the Government immediately after the general election or thereafter.[97] In Haryana the Governor recommended the imposition of the President's rule on the ground that the ministry was not stable, even though it had a majority[98] in the Legislature. Similarly, in UP after the fall of Charan Singh Ministry in 1968, C.B. Gupta[99] and in Orissa in March 1973, after the resignation

of Mrs Nandini Satpathy, the Chief Minister, Biju Patnaik[100] the leader of the opposition (having a following of 73 members in a House of 140) were not allowed by the Governors to form the Ministry because in their view it would not have been stable.

Hence, the concept of a stable Government has played an important part in the appointment of the Chief Ministers and the Governors have quite frequently used it either to favour a particular party or for making a discrimination against the other party. In fact, it seems that the stability of a Government is a very vague expression and it does not always depend upon the substantial majority alone. D.C. Pavate, the former Governor of Punjab, seems to be right when he says that "Stability meant not only the numerical superiority of the ruling party but also its ability to hold on to the majority strength and continuing with it."[101] This fact can be substantiated in the sense that a party having a substantial majority in the Legislative Assembly may become a minority party at any time. The examples of Haryana and Madhya Pradesh can be quoted in support of this contention.[102] Even the United Front Ministries in UP, West Bengal and Bihar had majorities after the elections of 1967 but they too, one after the other went out of office. It will not be out of place to mention here that in UP after the General Election of 1967, when B. Das, the Governor assessed the respective strength of the Congress and the SVD, the strength of the Congress was assessed at 214 (a majority of four).[103] Similarly in Rajasthan Hukum Singh, the Governor, invited Mohan Lal Sukhadia when the strength of the Congress party was 94 and that of the opposition 88.[104] These were not substantial majorities for ensuring a stable Government. However, the Government in Rajasthan has proved to be very stable, though initially it had a majority of six only, but not the Government of UP which fell on the 8th day.

This shows that sometimes a Government, which the Governor may think to be unstable may be stable and a Government which he thinks stable may be unstable. For example, in Bihar, the Governor Nityanand Kanungo said on October 26, 1970 that the State Government led by Daroga Prasad Rai was stable[105] but the Ministry went out of office on December 18, 1970.[106] Similarly, D.K. Borooah, the successor of Kanungo in Bihar told the reporters that "While the majority of the ruling coalition headed by Bhola

Paswan could be tested only in the Assembly, it had not shown signs of political instability following the withdrawal of support by the CPI."[107] This statement was made by the Governor on July 16, 1971 but the Government went out of office on December 27, 1971,[108] that is just within six months. It could not face the Assembly even once because it resigned three days before the beginning of the budget session which was to begin on December 30, 1971. Are these the examples of stable Governments? It is surprising to note that the Government of Bhola Paswan was appointed on June 2, 1971 and Raj Bhavan communique said that "on being satisfied that progressive Legislature party has a comfortable majority, the Governor invited Mr Paswan to form a new Government in the State. The Governor had earlier rejected the demand of Karpoori Thakur, the out-going Chief Minister, for the dissolution of the Assembly and holding mid-term poll at the earliest opportunity."[109] This Government which according to the Governor had a comfortable majority remained in office only for 208 days and did not face the Assembly during the last six months of its existence in spite of the demand of the opposition. In all, in Bihar there were ten Ministries between March 5, 1967 and March, 1972.

In the light of this experience, would it not be better if the Governors do not forecast about the stability or instability of the Government. But some of the Governors do not agree with this view. For instance, while recommending the President's rule in Haryana when Rao Birendra Singh had a majority, the Governor in his report to the President said: "If the Assembly is convened and either the ruling party or the opposition can establish, its majority even then there will be no peace or stability in the present circumstances. . . . . As I see the position, the Congress Legislature Party may, perhaps, be able to topple the present Samyukta Dal Government with the help of Devi Lal Group."[110]

While commenting on this report of the Governor, Sezhyan remarked that "hitherto I was under the impression that only the important Ministers at the Centre have astrologers by their side to predict the future. . . . But now we find a Governor taking the role of an astrologer and saying what will happen if the Assembly is convened. This is a piece of astrology, a piece of palmistry and crystal-gazing.."[111] It really seems strange that the Governors thought that the Soshit Dal Ministry in Bihar, P.C. Ghosh

Ministry in West Bengal and Lachhman Singh Gill's Ministry in Punjab would be stable which consisted of a small number of defectors.

It will not be out of place to mention here that in Bihar there were nine Ministries between March 5, 1967 and June 2, 1971 and none of them was in office for more than a year.[112] The tenth Ministry of Kedar Pandey also went out of office after fifteen months. In UP there were six Ministries between March 1967 and June 1973[113] and none of them was in office for more than a year except that of Tripathi which was in office for about twenty-six months and so also in Punjab, there were four Ministries between March, 1967 and September, 1971[114] and none of them was in office for more than fifteen months. In West Bengal too there were four Ministries between March 1967 and December 1971 and none of them was in office for more than thirteen months.[115] In Madhya Pradesh the Ministry of D. P. Mishra remained in office for about five months, that of Raja of Sarangarh just for a week i.e., from March 13, 1969 to March 20, 1969. In Gujarat when Hitendra Desai formed his Ministry for the second time on April 3, 1971, it went out of office on May 14, 1971 i.e., just after forty days. In Orissa the Government of Mrs. Nandini Satpathy remained in office for a period of less than nine months, that is from June 14, 1971 to March 3, 1972. In Manipur the Ministry of Alimuddin went out of office within thirteen months. It took office on March 20, 1972 and went out of office on March 28, 1973. These are the examples of unstable Ministries, which were considered stable by the Governors when they were installed.

Hence, it seems that constitutionally the function of the Governor is to instal a Government which commands the confidence of the Assembly for the time being and it is difficult to predict how long a Government is likely to remain in office and, therefore, the Governor ordinarily should not be much worried about the stability of the Government unless they continue to fall too frequently and too quickly.[116] When B. Das, the Governor of UP, immediately after the General Elections of 1967, was asked at the time of installing the Ministry whether he had taken into consideration any consequences that may follow his decision, Biswanath Das said that "he did not have to think of the consequences, he had only to decide which party commands a majority."[117]

Here, it will not be out of place to mention that sometimes the Governors have installed Ministries which in their view were unstable. For instance, when the Gill's Ministry was installed in Punjab, even at that time the Governor had a feeling that it would not be a stable Government. The Governor on the second page of his report to the President said that "the Congress Legislature Party extended its support to the Gill Ministry. Such an arrangement was *ab initio* fraught with instability as the Gill Ministry consisted of and was led by Legislators who were drawn together not by any ideological affinity but by a desire to gain political power."[118]

Similarly in Madhya Pradesh after the resignation of G.N. Singh on March 10, 1969, the Governor, K.C. Reddy appointed Raja Naresh Chandra Singh of Sarangarh as a Chief Minister knowing fully well that he did not have the confidence of the House and hence his Government would not be stable.[119]

It may also be noted in this connection that, whenever, the Governor invites the leader of the largest party to form the Government, he may fix a time by which the leader designate should inform the Governor whether he is in a position to form the Government or not.[120] If the leader designate requests for the extension of time, the Governor may or may not accept the request. In Punjab, for instance, Gurnam Singh the Chief Minister, resigned on November 23, 1967 when Lachhman Singh Gill along with 15 other legislators defected from the PUF (Progressive United Front).[121] Since Gurnam Singh was still the leader of the largest party, therefore, the Governor invited Gurnam Singh again to form the Government by November 25, 1967.[122] On November 25, 1967, Gurnam Singh while leaving for Delhi wrote a letter to the Governor that he would meet him on November 26, 1967.[123] But the Governor appointed Lachhman Singh Gill as a Chief Minister without waiting for Gurnam Singh.[124]

But in Bihar after the resignation of the Ministry of Bhola Paswan Shastri in June 1968, when M. P. Sinha, the leader of the Congress Legislature party was invited to form the Government, he wanted some time to explore the possibilities[125] but the Governor did not agree.[126] The Governor in his report to the President said that "one of the reasons for not granting time to Mr Sinha was that the Appropriation Bill had to be passed before June 30."[127] The Governor was also not ready to accept the

request of the United Front that its leader Bhola Paswan be summoned again, to form the Government. In his report to the President the Governor said, that "he could not accept the claim of Bhola Paswan within 24 hours of his resignation of the Council of Ministers that he was in a position to form a Government presumably with the support of defectors from other parties,"[128] and hence, he recommended the imposition of President's rule. It will not be out of place to mention here that P.C. Ghosh in West Bengal, Lachhman Singh Gill in Punjab, Charan Singh in UP, T.N. Singh in Madhya Pradesh, Rao Birendra Singh in Haryana who themselves were defectors were allowed to form the Government and some of these Governments were exclusively of defectors. Here it may also be mentioned that in more or less similar circumstances, the Governor of Punjab, D.C. Pavate invited Gurnam Singh to form the Ministry again, after he had resigned.[129] Similarly, Hitendra Desai in Gujarat[130] and Virendra Patil in Mysore in April 1971 were invited to form the Government again when they were acting as a caretaker Chief Minister[131] after their resignations had been accepted. In all these three cases, the caretaker Chief Ministers formed the Ministries again. Even in West Bengal when Ajoy Mukherjee resigned on March 16, 1970, because of his differences with CPI(M) the Governor (S.S. Dhavan) sounded the caretaker Chief Minister to form an alternative Ministry but he refused.[132] Since Bhola Paswan Shastri was still acting as a Chief Minister, therefore, constitutionally there was nothing wrong in inviting him to form the Government again unless the Governor was convinced that the Government would be too unstable. In fact, the President's rule should be the last resort. When Shriman Narayan, the Governor of Gujarat asked Hitendra Desai, the caretaker Chief Minister to form the Government, Kantilal Ghia, the leader of the Congress Legislature party criticised him. Defending his action he said: "when the outgoing Chief Minister had been able to muster the required strength and Ghia had failed to do so despite sufficient time allowed to him, the proclamation of President's rule in Gujarat would have been highly improper. I am of the definite view that the President should take over the administration of a State only when no political party or a coalition of parties is in a position to run the Government with a reasonable quantum of stability.[133] Hence, the Governor of Bihar, before recommending the President's rule should have verified

the claim of the majority of Bhola Paswan as was done by Shriman Narayan in Gujarat.

ELECTION OF THE LEADER BY THE PARTY

About the appointment of a Chief Minister, it may also be asked as to how far would it be constitutionally proper for the Governor to appoint a particular member as a Chief Minister before he is elected by his party as its leader. Ordinarily it is expected that unless the majority party elects a particular person as its own leader, the Governor should not invite anybody from the majority party to form a Government. This is the usual practice followed in India. It is worth stating that even an unquestioned leader of the standing of Jawaharlal Nehru was elected by the Congress Parliamentary party as its leader every time after each general election. However, there are examples where the Governors, on the recommendation of the out-going Chief Minister, have invited a person to form Government without his being formally elected by the majority party as its leader. For example, in Andhra when Sanjiva Reddy resigned from the Chief Ministership, he advised the Governor to swear in Brahmananda Reddy who had not been elected by the party as its leader.[131]

So far as the leaders of the coalition Governments are concerned, though it would be better if they are elected at a meeting attended by all the MLAs of the parties forming a United Front, there is no such firm practice in this respect. In some cases the leaders have been so elected as for instance, in Madhya Pradesh Raja Naresh Chandra Singh of Sarangarh was so elected at a general body meeting of the United Front, after G.N. Singh had resigned but in other cases the leaders of the various parties elected these leaders without referring this matter to the members of their party. For instance, Ajoy Mukherjee in West Bengal, Charan Singh in U.P., Bhola Paswan in Bihar were so elected.

It will not be out of place to mention here that when the General Elections took place in England on June 18, 1970, the Conservative Party won 330 seats out of 630 and as a result thereof the defeated Prime Minister Harold Wilson tendered his resignation at 6.24 p.m. on the same day. "The Queen appears to have sent for Mr Heath as the known leader of his party without formally consulting other members of his party. This agrees with recent precedents."[132] Similarly Baldwin 1923, Macmillan in 1957 and

Earl of Home in 1963 were appointed as Prime Minister in England without a formal election by the party as their leader. However, in India, with the exception mentioned above, ordinarily the Governors invite the leader to form a Government only after he has been elected so by his party.

When the Chief Minister dies in office, then of course, the senior most Minister, is appointed as a caretaker Chief Minister. For example after the death of B.C. Roy in West Bengal, Mr P.C. Sen and after the death of Annadurai in Tamil Nadu, V. R. Nedunchezhian were appointed as acting Chief Ministers. In Tamil Nadu a notification by the Government said: "Till the election of the new leader by the party in majority in the Assembly a new Council of Ministers at Raj Bhavan at 1.15 a.m. headed by V.R. Nedunchezhian, the senior most of the Ministers was sworn in."[136]

It will not be out of place to mention here that sometimes, the Chief Minister alone has been treated synonymous with Council of Ministers which is constitutionally not proper. For instance, on February 26, 1969 in Bihar, Harihar Singh was sworn in as a Chief Minister. For nearly nine days he was unable to form his cabinet and there was technically speaking no Government because the Chief Minister alone does not make a Council of Ministers.[137]

NOTES

1. After the General Elections of 1972, P.C. Sethi in Madhya Pradesh, Ghanshyam Oza in Gujarat, Devaraj Urs in Mysore, Sidhartha Shankar Ray in West Bengal, and Mrs Nandini Satpathy in Orissa, were appointed as Chief Ministers when they were not members of the respective State Legislatures. Giani Gurmukh Singh Musafir in Punjab, after its reorganisation on linguistic basis in November 1966, T. N. Singh in U.P. on October 18, 1970 and Raja Naresh Chandra Singh in Madhya Pradesh in March 1969, were appointed as Chief Ministers when they were not members of the State Legislatures. Similarly Achutha Menon was appointed as a Chief Minister in Kerala in 1970 when he was not a member of the State Legislature.
2. Article 164 (4).
3. *Hindustan Times*, September 13, 1967, p. 1.
4. *ibid.*, p. 7.
5. Article 164 (4).

6. In this case the court held that "article 164 is divided into five clauses. The first deals with the appointment of the Chief Minister and other Ministers; the second enjoins the collective responsibility of the Council of Ministers to the Legislative Assembly of the State; the third makes it incumbent upon the Governor to administer the oath of office and of secrecy to every minister before he enters upon his office: the fourth provides that a minister who is not a member of the Legislature for six consecutive months shall vacate his office; and the fifth confers upon the Legislature the power to fix the salaries and allowances of ministers by law. If the word "Minister" throughout this Article was not intended to include the Chief Minister, it would follow that the Chief Minister is exempted from the constitutional duty to take the oath of office, and shall not cease to be a minister if after his appointment his election to the Legislature is set aside and he is not re-elected within six months of being unseated. Moreover, the salary and allowances of the Chief Minister, unlike those of his colleagues, will not be under the control of the Legislature of the State as in the case of his other colleagues. The court cannot accept an interpretation which will lead to such absurd results. It is, clear that the word 'Minister' in clauses second, third, fourth and fifth of article 164 includes the Chief Minister. Under clause five (sic) a Chief Minister like any other Minister can hold office for six months without being a member of the Legislature. *AIR*, 1962, All. p. 301.
7. Harnam Sharma, Vs. Tribhuvan Narain Singh. *AIR*, 1971, All. 237.
8. *AIR*, 1971, SC., 1331.
9. "An amendment was proposed in the Constituent Assembly that the following be substituted:
   'A Minister shall at the time of his being chosen as such be a member of the Legislative Assembly or Legislative Council of the State, as the case may be.' This amendment was, however, negatived."
   CAD, dated June 1, 1949, official reports, Vol. VIII, p. 521; Harnam Sharma, Vs. Tribhuvan Narain Singh, *AIR*, 1971, SC, 1333.
10. In re Ramamoorthi, *AIR* 1953 Mad., 94.
11. *Times of India*, September 12, 1968, p. 3.
12. *Tribune*, September 19, 1967, p. 2.
13. (a) For instance, in Bihar, the President issued a Proclamation on March 9, 1972 extending the Central rule in Bihar. The original proclamation imposing the President's rule in the State was valid only till March 8, midnight, because it was issued on January 8, but it could not be passed by Parliament because the Parliament did not meet between January 8 and March 8, 1972 and it met on March 13, This left the Government with no alternative other than to recommend to the President that a fresh proclamation be issued. *ibid*,, March 10, 1972, p. 10.
    (b) Similarly in Orissa, Proclamation under Article 356 was issued on January 23, 1971 and it was reissued on March 23, 1971 without placing it on the table of Parliament. *Statesman*, March 24, 1971, p. 1.

III

Dismissal of a Chief Minister

VOTE OF NO CONFIDENCE

According to Article 164 (1) of the Constitution, "the Chief Minister shall be appointed by the Governor and he holds office during the pleasure of the Governor. But what does the expression "holding an office during the pleasure of the Governor" mean? Ordinarily pleasure of the Governor means that the Ministry remains in office so long as it enjoys the confidence of the Legislative Assembly. According to B.R. Ambedkar: 'During pleasure' is always understood to mean that the pleasure shall not continue notwithstanding the fact that the Ministry has lost the confidence of the majority. The moment the Ministry has lost the confidence of the majority, it is presumed that the President (in this case the Governor) will exercise his 'pleasure' in dismissing the Ministry."[1]

The Governor, therefore, will dismiss the Ministry if it does not resign when a clear vote of no confidence has been passed against it. K. Subba Rao, the former Chief Justice of India agrees with this view when he says that a harmonious reading of these two provisions (Article 75 (2) and 75 (3) leads to the conclusion that the said pleasure can be exercised only when the Ministry has lost its confidence.[2]

The Ministry will loose the confidence if:

(i) a formal vote of no confidence is passed against it or a formal vote of confidence is rejected;[3]

(ii) a money Bill or any other Bill dealing with important policy matter, introduced by the Government is defeated.

So far as the passing of a formal vote of no-confidence is concerned, it must be either against the Ministry as a whole or it must be against the Chief Minister personally. In case, if the

conduct of a particular Minister is censured, then the Chief Minister is not bound to consider it as a vote of no confidence against his Ministry as a whole. For instance, the Kerala State Assembly passed a resolution asking for an inquiry against B. Wellington, KTP, Health Minister, in the absence of E.M.S. Namboodiripad, the then Chief Minister, who had gone to East Germany.[4] On his return "Namboodiripad declined to say anything definite to a question whether he would treat a resolution recommending anti-corruption probe against the Marxist Ministers, as an expression of lack of confidence of the Legislature." The Marxist leader, however said that "he would not resign unless he was voted out in the Legislature...He said that he would not move a confidence vote in the Legislature. The Governor also did not advise him to seek a confidence vote in the Legislature, he added... A no-confidence motion if it came up in the Legislature would be taken up immediately."[5] Here it may be mentioned that the Assembly was in session.

If the Government is defeated on a Money Bill then the Government should ordinarily resign. For instance, Bhola Paswan Ministry in Bihar resigned after it was defeated on grants for animal husbandry.[6] But there are instances where the Government did not do so. For instance in Bihar the Government was defeated on a CPI-sponsored motion disapproving the Sales Tax (amendment) Bill ordinance on December 14, 1973, but the government did not resign[7] on the ground that only two days ago, the House had rejected a no-confidence motion against the Ministry by 175 votes to 86. The Government therefore, treated it as a snap vote. If the Government is defeated on an important policy matter and if the defeat represents the loss of strength of the ruling party in the Assembly, even then the Government does not have to resign as was done by E.M.S. Namboodiripad on the question of inquiries against some of his Ministers.[8] It may however, be mentioned that even if the defeat is on a major issue but if the ruling party's majority in the Assembly is intact, it may decide not to resign unless a formal vote of no confidence is passed.[9] It may also be mentioned here, that it is for the Government and Government alone to decide whether the defeat is on a minor or a major issue.[10] But if the Government is defeated on a snap vote then the position is entirely different. If the Government is defeated on a snap vote on an ordinary Bill, the

Government may or may not resign. For example, in Andhra the Ministry of Brahmananda Reddy was defeated on a snap vote over the Andhra Pradesh Agricultural Pests and Diseases (amendment) Bill 1970, but the Government did not resign.[11] This is the practice even in England. The Conservative Government of Edward Heath did not resign when it was defeated on a snap vote on immigration policy in November 1972.[12] But if the Government is defeated on a Money Bill even in a snap vote, the Goverment is bound to resign. For instance, in UP, on August 25, 1969, the Opposition demanded a division on Jail grants but the Speaker adjourned the House. The Governor, however, expressed "the opinion that had the Government been actually defeated in a snap vote on Jail grants, it would have been obliged to resign as different from the case of snap vote on a Bill. The same Government could not have presented again the Budget grants. It might be that the Congress party leader would have been invited to form the Government again and then he could have presented the grant."[13] It will not be out of place to mention here that when the Finance Minister in Gurnam Singh Ministry refused to introduce the budget because of the revolt of the Akali Party against his leadership, then he himself introduced the budget, which was defeated. After the defeat of the Government the Chief Minister did not submit his resignation immediately and avoided it for more than 24 hours and as a result thereof, the Governor had to write to Gurnam Singh to submit his resignation without delay. He, in fact, attended the session of the Assembly the next day without submitting his resignation. The impropriety on the part of the Chief Minister that he did not submit his resignation immediately after his defeat was discussed even in the Parliament.

DEFEAT OF THE GOVERNMENT ON GOVERNOR'S ADDRESS

About the vote of no-confidence, it should, however, be noted that when the Government is defeated even on a major issue, the pleasure may not always be withdrawn, if the Cabinet still commands a majority. There can be a temporary defeat of a Government particularly of a coalition, on certain specific issues on which the political parties which have formed a coalition Government, may either agree to differ or may differ otherwise. This happened in Punjab in April, 1967 when the Punjab

Government was "defeated by 53 votes to 49 on the issue of an opposition amendment to the Governor's Address."[15] Then the Chief Minister neither resigned, nor did the Governor withdraw the pleasure.[16] Commenting on this incident *The Tribune* wrote: "All omens in Punjab point one way—President's rule. The defeat of Gurnam Singh's Ministry on Wednesday was a notice to it to quit. Not all the quibblings by Mr Gurnam Singh or his legal experts can make an iota of difference to it. Some Ministries can be more thick skinned than others. But if Mr Gurnam Singh was not prepared to treat Wednesday's defeat as a vote of no confidence, he had only one course left. The Cabinet has at all times the privilege of demonstrating by proposing a vote of confidence, its control of majority. This is in fact, what Mr Gurnam Singh said, he would do, if necessary. Necessity is the mother of invention. If he were so confident of the confidence of a majority, he need not have resorted to the shabby expedient of adjourning the House sine die."[17]

The Governor, however, was of the opinion that "the situation was not so clear as to justify the dismissal of the Government on that day when the Congress opposition amendment to the motion of thanks to the Governor's address was carried."[18] He held the view that before the pleasure is withdrawn, either a formal vote of no-confidence should be passed or a formal vote of confidence should be rejected. In this case the stand taken by the Governor seems to be right. According to K. Santhanam: "The passing of an amendment to the Governors address does not amount to a no-confidence motion and need not involve the resignation of the Ministry. It is always open to the Government to accept the amendment. Even in the case of budget demands, a small reduction in a demand need not be treated as no-confidence, if the Government is prepared to accept the reduction. It is only when the defeat is such that the Government could not secure sufficient funds or pass legislation which is considered to be vital that the resignation of the Ministry becomes necessary."[19]

But if because of defections in party in power, the Government ceases to have a majority and is defeated on a motion of thanks to the Governor's address, the Chief Minister perhaps will have no alternative but to resign immediately and if he does not do so the Governor will have no alternative but to dismiss him. The first course of action was adopted by C.B. Gupta in March 1969

the then Chief Minister of UP, when the Governor's address was rejected because of defections in his party led by Charan Singh. Similarly T.N. Singh, the Chief Minister of UP also, resigned when his Government was defeated on the motion of thanks to the Governor's address on March 30, 1971.[20] In such a situation it is very difficult to agree with the proposition expounded by L.N. Sarin that "if he wanted, he would have declined to resign as Lord Rosebury did when his Government was defeated by eight votes on the Queen's Address."[21]

DEFEAT OF GOVERNMENT IN THE ELECTION OF THE SPEAKER

About the vote of no-confidence, it may however, be further asked as to how far the Chief Minister is bound to resign if the Government's nominee for the office of the Speaker is defeated. In this respect it seems that the Ministry is not bound to resign. For instance, in Haryana when the election of the Speaker took place on March 17, 1967, Bhagwat Dyal Sharma, the then Chief Minister put up Pandit Sri Krishan for the office of the Speaker who was defeated. It was, in fact, for the first time in political history of the country after independence where an official nominee of the Congress party for the office of the Speakership was defeated by another Congressman (Rao Birendra Singh in this case) with the help of the opposition.

After the election of Rao Birendra Singh as a Speaker, 12 Congressmen resigned from the Congress Legislature Party and joined hands with the Opposition. On March 22, 1967, the Congress Ministry tendered its resignation. It means the Ministry did not resign immediately after the defeat of its candidate for the office of the Speaker and hence, it can be concluded that if the nominee of the Government for the office of the Speaker is defeated, the Government is not bound to resign. In support of this contention the example of Bihar can also be cited. For instance, immediately after the mid-term poll of 1969 when a nominee of Bihar Government for the office of the Speaker was defeated by 172 to 155 votes, Harihar Singh, the then Chief Minister of Coalition Government did not resign.[22]

REFUSAL OF THE CHIEF MINISTER TO FACE THE ASSEMBLY

The Governor may also withdraw his pleasure when he has a reasonable ground to believe that the Chief Minister no longer enjoys the confidence of the Legislative Assembly and if he is not prepared to face the Assembly on one pretext or the other. According to the report of the Governors' Committee: "The test of confidence in the Ministry should normally be left to a vote in the Assembly. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as prima facie proof of his no longer enjoying the confidence of the Legislature. If an alternative Ministry can be formed which, in the Governor's view, can command a majority in the Assembly he must dismiss the Ministry in Power and install an alternative Ministry in office. On the other hand, if formation of such a Ministry is not possible, the Governor will be left with no alternative but to make a report to the President under Article 356 and to recommend at the same time the dissolution of the Assembly. The prospect of President's rule and of dissolution may well prove to be a salutory corrective in situations in which constitutional requirements are sought to be undermined."[23]

It may also be mentioned here that the Administrative Reforms Commission had already recommended that "Situations have arisen in the past and may arise in future where the Chief Minister, who is doubtful of majority support in the Legislature is either reluctant to face the Legislature as suggested by the Governor or unwilling to quit the office. In a situation of this kind, the Governor appears to have no choice but to dismiss the Ministry in exercise of his powers under Article 164 of the Constitution, if he is personally convinced that the Ministry has lost support of the Legislature."[24] This is also the view of the Speakers' Conference. Such a situation developed in West Bengal when P.C. Ghosh a senior Minister defected along with 17 members from the United Front on November 2, 1967 and thereby reduced strength of the ruling party to 136 in a House of 280.[25] This created a picquant situation in West Bengal because the Congress party came out openly in support of P.C. Ghosh and requested the Governor to summon the Session of the Legislative Assembly so that a formal vote of no-confidence may be moved against the Council of Ministers.

Ordinarily, immediately, after P.C. Ghosh and others have defected, the Chief Minister, either should have resigned or should have advised the Governor to summon the session of the Legislative Assembly within a reasonably short time so that he could demonstratively prove that he still had a majority with him. The first course of action was adopted by Bhola Paswan Shastri on June 22, 1969 when the Jana Sangh group of 34 MLAs withdrew its support from his Ministry[26]. The second course of action was adopted by Biswanath Das, in Orissa in June 1972, when some of the members of the parties supporting him defected to the Congress. He immediately fixed the date of the Assembly session[27] and when he was sure that he did not have a majority, he resigned without waiting for the Assembly to meet. Similarly, when in January 1971, Jana Congress having 25 members withdrew its support from the coalition Government of R.N. Singh Deo, he immediately fixed January 19 as the date of the Assembly session and on January 9, when he was convinced that he did not have majority with him, he immediately resigned without waiting for the Assembly to meet. The West Bengal Chief Minister also should have done this,[28] which he failed to do. As a result, thereof, the Governor suggested twice, to the Chief Minister to face the Assembly immediately "within seven days. The Chief Minister proposed to call the meeting of the Assembly on 18th December, more than a month and a half after the suggestion was made to him,"[30] but the Governor, Dharam Vira, insisted that the session should be summoned before November 30, 1967 at the latest.[31] The Chief Minister, however, refused to accept this advice[32] and as a result thereof the Governor dismissed the Ministry.[33] Since the time gap between the dates suggested by the Governor and the Chief Minister was of only 18 days, heaven would not have fallen if the Governor had accepted the advice of the Chief Minister. While supporting the Governor of West Bengal for the dismissal of the Ministry Shri Y.B. Chavan, the then Home Minister said, that "the Legislature and the executive are very delicately balanced...and he has to see that the executive is collectively responsible to the Legislature. He can use his pleasure only on the judgement whether the person concerned maintains or commands a majority in the House or not...If you see the facts of the Bengal's case, really speaking what was the Governor doing in this case?...He was trying to bring the executive and the

Legislature face to face with each other...This is the role of an umpire. Here really speaking, a situation has arisen for a judgement because certain people had come and informed and given in writing to the Governor that they were no longer supporting the Government party. The Governor was clearly in the know of things that the Chief Minister had lost the majority. He merely asked him to call the Assembly session soon to which the answer was given after nearly six weeks or eight weeks."[34]

But strangely enough this logic was not applied in UP when the Congress (R) withdrew its support from Charan Singh Ministry. B. Gopala Reddy, the Governor, instead of asking him to face[35] the Assembly, asked him to resign on the ground that he was the Chief Minister of a coalition and not of a single majority party. The Chief Minister on the other hand was ready to face the Assembly which had already been summoned and was to meet on October 6, 1970. The Chief Minister, was, in fact, ready to face it even within 24 hours, but still, the Governor wrote a letter to the President on September 29, 1970, requesting him to impose the President's Rule because the Chief Minister refused to tender his resignation as demanded by the Governor and as a result thereof, the President's rule was imposed on October 3, 1970, that is, just three days before the session of the Assembly[36] which was to begin on October 6, 1970. This seems to be highly improper from a Constitutional point of view because when the Chief Minister was prepared to face the Assembly almost immediately, to prove that he has a majority, he should have been given a chance to test his strength. The Chief Minister of West Bengal was dismissed because he was not prepared to face the Assembly but Charan Singh the Chief Minister of UP was dismissed in spite of the fact that he was prepared to face it immediately.

But this time a new theory was coined to justify the actions of the Governor and it was said that "when the entire collective thing goes down and vanishes in the air, how can the Governor consult the Council of Ministers because the Constitution enjoins upon him to act on the advice of the Council of Ministers. If the Council of Ministers ceases to function how can he possibly function?... The Governor has to discharge his responsibility of carrying on a Constitutional Government on the advice of a Council of Ministers responsible to the Assembly. The Council of Ministers having broken up into fragments already

and there was complete schism between the two groups constituting the Cabinet, it was impossible for any Governor who has a conscience unless he has decided, 'I shall function only on the advice of' the splinter group which has no majority."[37] Even the Attorney General is reported to have said that "after a coalition had broken Shri Charan Singh had no right to continue as a Chief Minister of a coalition Ministry and that his advice no longer had any binding effect on the Governor."[38]

If these arguments are examined in depth and a little bit more carefully then it will be found that they are not very sound. For instance, so far as the advice about the dismissal of Ministers is concerned, it is solely the prerogative of the Chief Minister and Chief Minister alone and not that of the Council of Ministers. It is really very strange that Charan Singh's advice to deprive the Ministers of their portfolios was accepted by the Governor but not his advice to dismiss them. It means that in one respect the advice was binding but not in the other. Moreover, it should not be forgotten that in the first instance, Charan Singh formed a minority Government, as a Head of a single party[39] and at that time there was no coalition. It was only some months later that the Congress (R) joined the Ministry and established a coalition and therefore, when the ruling Congress withdrew support, the *status quo ante* was restored and that did not invalidate Charan Singh's mandate. Had the Congress (R) not joined the Coalition or had Charan Singh refused to give Congress (R) a share in the Ministry after his appointment and the minority Government of Charan Singh would have been allowed to continue, would it have been possible for the Congress (R) to oust Charan Singh either by withdrawing a support or by moving a vote of no-confidence, particularly when other parties were ready to support him? The answer seems to be in the negative which means what the Congress party could not have done by being in opposition, how could it do by being a partner in the coalition ?

Then again, even the minority Government has a right to stay in office so long as it has the confidence of the Assembly and not that of a particular party or a group.[40] When the Congress withdrew support, the Congress (O), Jana Sangh, SSP, and Swatantra parties extended their support to Charan Singh Ministry[41] and all these parties combined had a majority in the Assembly and hence, to say that he did not have a majority was

wrong. Nath Pai seems to be right when he says that, "if there is a coalition and if the ruling Congress supports you, the Government is constitutionally constituted. But if for the reasons known to the ruling Congress, the ruling Congress withdraws the support, there is a constitutional crisis. That means whether there is a constitutional Government or not is made synonymons with the availability of support of one particular party. Withdraw that support and there is a breakdown of the Constitution. This is the dangerous innovation and interpretation given to the Constitution by Dr Gopala Reddy. That I think deserves at least a Padma Vibhushan, if not Bharat Ratna."[42]

Moreover, if the principle that the Chief Minister of a coalition Government must resign, if the biggest partner of the coalition withdraws the support, is accepted, then its natural corollary would be that the Chief Minister remains in office not so long as he enjoys the confidence of the House but only so long as he enjoys the confidence of the largest partner in the coalition. For instance, the SSP, PSP, CPI and CPI(M) who may have the following of 50, 55, 60 and 65 respectively in a House of 350, if they form a Government with a Chief Minister of SSP, then he will remain in office only so long as the CPI(M) with a following of 65 wants him and, whenever it withdraws the support, it would be considered as a Constitutional crisis, if the analogy of UP in Charan Singh's case is followed to its logical end. This interpretation of the Constitution cannot be accepted by any person who has even some knowledge of a Constitutional law.

Besides this, A.K. Sen, the former Law Minister while defending the action of the Governor of UP in this case, tried to make a very fine distinction so far as the breaking of the coalition Government is concerned. For instance, he says that if the smaller partner of the coalition withdraws the support and if its Ministers resign, then the Chief Minister can carry on till the Assembly meets,[43] even if the Ministry ceases to command the confidence of the House but if the bigger partner of coalition withdraws the support then the Chief Minister, whether he has a majority of the House with him or not, should not be allowed to stay in office.[44] This, it seems, is not the interpretation of the Constitution, but playing politics with the Constitution, which is very dangerous.

While commenting on the dismissal of Charan Singh's Ministry, Mrs. Laxmi Pandit who had been the Governor of Bombay State, said:

"I recall the day when the first Congress Government took office in Uttar Pradesh in 1937. I had the privilege of being a member of the first Cabinet led by Pant Ji. It was an emotion charged period. Gandhiji and Pandit Nehru called on us to dedicate ourselves to the nurturing of democratic seed which has been planted and of building healthy democratic conventions for the time when India would be free. It is impossible to imagine either Pant Ji or Rafi Ahmed Kidwai acquiescing in what has taken place in Uttar Pradesh. Had they been alive today, they might have led the first Civil Disobedience movement against this authoritarian decision with regard to Uttar Pradesh."[45]

The conduct of the Speaker of West Bengal was criticised because he did not allow the Ministry to prove its majority on the floor of the House. But what about the conduct of the Governor of UP? If the Governors and the Speakers do not allow the Chief Minister to test their strength in the Assembly, then certainly the future of Indian Parliamentary democracy does not seem to be very bright. M. Ananthasayanam Ayyanger, former Speaker of Lok Sabha, and the former Governor of Bihar seems to be right when he says that, " democracy could not be safe if the Governors started installing one Government with one hand and dismissing it with another.....even though there was scope to act against Mr Krishna Vallabh Sahai's Ministry, I did not do so because that might have meant as an interference with democratically constituted Government."[46]

Here, it should also be noted that in West Bengal when the Chief Minister refused to summon the Assembly, he was dismissed by withdrawing the pleasure under article 164 (1) and an alternative Ministry of P.C. Ghosh was installed. But in UP when Charan Singh refused to resign this course of action was not adopted because the Governor could not find another P.C. Ghosh in UP and hence, imposition of the President's rule was recommended. The Governor in UP did not believe the written assurance of other parties that they would support Charan Singh Ministry, whereas the Governor of West Bengal believed in the statements given in writing.

It may however, be mentioned in this connection that if the Governor is favourably inclined towards the Chief Minister, he

may not press the Chief Minister to face the Assembly immediately even if there is a reasonable ground to believe that the majority of the Chief Minister is doubtful. This was done by M. Ananthasayanam Ayyanger[48] and D.K. Barooah the Governors of Bihar and B. Gopala Reddy[49], the Governor of UP.

In Haryana too, the Governor Justice Mehar Singh ignored the defections and did not ask the Chief Minister to face the Assembly in spite of a request by Chand Ram, the defecting leader[50]. For some time, even B.N. Chakravarti, his successor also adopted this attitude towards the Government of Rao Birendra Singh when Rao had a doubtful majority. For example, the Governor in his report to the President wrote that because of defections at one stage, the strength of the ruling party in Harayana came down to 39. Then on October 30, 1967 "I suggested to the Chief Minister that he might convene an early meeting of the Assembly for a trial of strength. He, however, felt that the trial of strength should come after the by-election due on December 30. As this was a reasonable proposition, I did not press my point"[51] The Governor also said that "it is not necessary for the Rao to resign until he ceases to be the leader of the largest single party in the Assembly."[52] Moreover, the Rao was not asked to face the Assembly immediately and when the Governor was asked if he thought that an early session of the Assembly should be summoned to test the relative strength of the Congress and the SVD, the Governor said : "In the present situation I find it difficult to press on the Chief Minister to call session earlier than January 27, the date he had indicated earlier. If he does not want an early session, I cannot do any thing in the present position... They will have an opportunity to test their relative strength when the Assembly meets. After all, that is only six weeks away."[53]

Similarly in Punjab, the Governor Dr D.C. Pavate did not press Parkash Singh Badal to face the Assembly immediately when his majority became doubtful. When three Sant Akali MLAs defected to Gurnam Singh Dal, the majority of Parkash Singh Badal was reduced from 54 to 51 in a House of 104. But after some time the Governor asked "Badal to submit to him a list of all his supporters signed by each Legislator or failing that convene an emergency session of the Assembly to prove his majority on the floor of the House."[54] Though Dr Pavate had given an option

to Badal to collect the signatures of the Legislators supporting him instead of facing the Assembly, yet the Chief Minister decided to convene the Assembly on August 5, 1970, instead of submitting the list of his supporters.[55] Later on Badal Ministry agreed to summon the Assembly on July 24, 1970.[56] But so far as Dr Pavate was concerned he is reported to have informed Delhi that "he was not inclined to make an issue of the Precise date of calling the Assembly."[57]

Similarly in Bihar the PVD (Progressive Vidhayak Dal) Government of Bhola Paswan Shastri which came to power on June 2, 1971, had lost majority on June 2, 1971, because the Communist Party of India, a major constituent of the PVD, withdrew support on the "abolition of the Datta Commission which was set-up by the previous SVD Government of Karpoori Thakur to inquire into charges of misuse of funds of Bharat Sevak Samaj against L N. Mishra the Union Minister for foreign trade and a former Bihar Minister Mr. Lahtan Chaudhary." The CPI had a strength of 28 members out of 177 members of the PVD in a House of 312.[58] But the Governor allowed the Minority Government to stay in office till July 22, 1971 and then on the recommendation of the Chief Minister who had a doubtful majority, dissolved the Assembly on July 22, 1971.[59] In this case, the Governor did not ask the Chief Minister to face the Assembly.

This shows that whether the Chief Minister will be allowed to stay in office or not after he has lost the confidence of the House, to a great extent depends upon the attitude of the Governor. The Governor of West Bengal, for instance said that he "cannot allow a minority Ministry to continue. It must face the Assembly soon and obtain its verdict."[60] But the Governors of Bihar, Haryana, UP and even Punjab were not so rigid, whereas the Governor of Madhya Pradesh was prepared to sustain a Minority Government even by proroguing the budget session.[61] Similarly in UP, the Governor B. Gopala Reddy took three different stands in the case of different Chief Ministers. For instance, "when the Government of C. B. Gupta lost majority, he was allowed to stay. At that time the Governor said that the Chief Minister should be given time to consolidate his position and the Chief Minister was not compelled to face the Assembly immediately. After the split of the Congress, the BKD formed the Government and the new

Congress supported it and for two months the BKD minority Government continued. But when the similar support to BKD was extended by Congress (O) and the Jana Sangh, in place of Congress (R), the Governor recommended the President's Rule."[62] While defending the action of the Governor of West Bengal for the dismissal of the Ministry, Morarji Desai, the then Finance Minister said that, "for a month and a half how can the Governor keep the Chief Minister in Office. The Governor would not have been fit to remain in office if he had allowed such a murder of the Constitution at the hands of the Chief Minister."[63] But when the Ministries of Mahamaya Prasad Sinha (for 74 days), and C.B. Gupta (for more than 65 days) were allowed to stay in office by M. Ananthasayanam Ayyanger and B. Gopala Reddy respectively, after they had lost the confidence of the House, then it was neither the murder of the democracy, nor were the Governors considered unfit to remain in office. Even the Governor of Haryana Shri B.N. Chakravarti was prepared to give six weeks to Rao Birendra Singh. It is of course a fact that the conduct of the Governor of Bihar in allowing Mahamaya Prasad Sinha was criticised by A.K. Sen in the Lok Sabha. For instance, while defending the action of the Governor of West Bengal, he said that the Governor of Bihar had become a party to the continuation of a minority Government without calling the session of the Assembly[64]. But strangely enough not a word was uttered by him against B. Gopala Reddy, the Governor of U.P.

When the party in power loses majority because of defections, should the Governor withdraw the pleasure immediately or not before the Assembly meets, on this question there are conflicting opinions. Y. B. Chavan, the former Union Home Minister said in Lok Sabha that "as a constitutional head of the State it was the duty of the Governor to watch always that the Chief Executive, namely the Chief Minister, enjoyed the support of the majority of the House. If there was any doubt about it, he had to take cognizance of it."[65] However, the then Law Minister did not agree with this view when he said that "the relative strength of the Government in the Legislature can be tested only on the floor of the House through a relevant vote and the Governor cannot take any cognizance of any changes in party or personal loyalties on the basis of public parade of its strength by the opposition."[66] Shri K. Santhanam also agrees with this view when he says that

"it is entirely wrong to think that it is the duty of the Governor to take note of an increase or decrease in the party strength from day-to-day. Once he has formed the Ministry, it is for the State Assembly to decide whether it should continue in office. Neither law nor convention prohibits a Cabinet having only minority support from conducting the Government so long as the Assembly does not record its disapproval by a no confidence motion or the rejection of the budget."[67]

N.C. Chatterjee also supports this view. He, for instance, says: "A lot of fuse is being made now that a man may not have a complete majority. We know that minority Ministries also function. In Kerala it functioned, in Great Britain it functioned. Why this is wonderful proposition put forward that unless you can demonstrate at every minute of your time, every minute of your tenure, that you have got a clear majority, you must go. That is not so according to our Constitution...Now who is to judge whether there is a majority or not? Who is to decide that they have forfeited the support of the majority? It is preposterous proposition, absolutely unwarranted by the mandatory provisions of the Constitution, that a Governor sitting in the Government House, would listen to stories, hearsays, reports and all sorts of rigmarole and that a Government House Corridors will be converted into a Lobby of Parliament where, the Governor sitting, the diverse members of Parliament will decide that this Council of Ministers has lost its support."[68]

Even K. Subba Rao, former Chief Justice of India, also agrees with this view when he says that the pleasure can be withdrawn "only when the Ministry ceases to have the confidence of the House. Who else except the House that could say that the Ministry has lost its confidence. The President could only dismiss the Ministry if it was voted down in the Lok Sabha. He shall not have the power to decide by extra-Parliamentary parleys that the Ministry has lost the majority. Parliament is the only form where the loss of the majority should be demonstrated for it is impossible to predict that a Member or Members who have decided to cross the floor would not change their mind before the voting in Parliament..."[69]. This is exactly what happened in Haryana.[70] Hence K. Subba Rao seems to be right when he says that "Under the Rules framed, Parliament meets in regular intervals and the

defectors and their supporters could as well wait till the next session and move the no-confidence motion therein."[71]

M.C. Chagla, former Chief Justice of Bombay High Court,[72] Dr P.N. Sapru,[73] and many other jurists agree with this view. Even the Ex-Speaker of the Lok Sabha N. Sanjiva Reddy agreed with this view. While presiding over the Presiding Officers' Conference he said that "the question whether a Chief Minister has lost majority or not should at all times be decided by the Assembly. In no circumstances it should be left to the Governor to determine whether a Chief Minister continues to enjoy the support of the majority of the members or not, even if the members make their opinion known to the Governor in writing. It is the prerogative of the Assembly to decide this issue. The Governor can dismiss a Ministry if the Assembly has passed a vote of no-confidence in the Ministry and the Ministry does not immediately tender its resignation.[74]

Though this approach seems to be constitutionally sound, the harmonious construction of Clauses (1) and (2) of Article 164 does not support this contention because if this principle is accepted, it would make the Government responsible to the Assembly only for a short period when it is in session. It is significant to note that in some cases the sessions are very brief.[75] But the responsibility of the Government to the Assembly should be a continuing process and ordinarily at no time the public should have the impression that the Government does not enjoy the confidence of the majority. If there are large scale defections of West Bengal, Haryana, UP, Bihar and Madhya Pradesh type, the Governor it seems is duty bound to take note of them, particularly when the opposition requests. The Governor may however, not take any note in spite of the request of the opposition if the session of the Assembly is due to meet within a reasonably short period. When the session is not due within a reasonably short period and if such a situation develops, the Governor it appears may ask the Chief Minister to face the House without unreasonable delay and if this advice is not accepted by the Ministry, the Governor may withdraw his pleasure and if he does so his action would be constitutional.[76] Messrs, M.C. Setalved, former Attorney General of India,[77] Asoke Sen, former Law Minister, Government of India,[78] M.N. Kaul, former Secretary of Lok Sabha agree with this view.[79]

DISMISSAL ON GROUNDS OF CORRUPTION

The Governor may also withdraw his pleasure when the Chief Minister tries to maintain his majority in the Legislative Assembly by practising corruption. According to Dr B.R. Ambedkar, holding an office during pleasure means: "that a minister shall be liable to removal on two grounds. One ground on which he would be liable to dismissal under the provisions contained in clause (2) of article 62 would be that he has lost the confidence of the House and secondly that his administration is not pure because the word used here is 'pleasure'. It would be perfectly open under that particular clause of article 62 for the President to call for the removal of a particular minister on the ground that he is guilty of corruption or bribery or mal-administration although that particular minister probably is a person who enjoyed the confidence of the House. I think honourable members will realise that a tenure of a minister must be subject not merely to one condition but to two conditions and two conditions are purity of administration and confidence of the House."[80]

This means that the confidence of the Legislative Assembly and the pleasure of the Governor may not always coincide. For instance, had late Partap Singh Kairon, the then Chief Minister of Punjab not resigned in 1964 after the Dass Commission's Report which upheld the charges of corruption against him, the Governor would have been within his constitutional rights to dismiss him in spite of the fact that he had the confidence of the Legislative Assembly.[81] Similarly, when the Rao Birendra Singh's Government in Haryana was maintaining a majority "by not too honourable means"[82] the Governor could have dismissed it on this ground alone and this would have been perfectly constitutional on the part of the Governor. It may, however, be mentioned in this connection that uptil now, no Governor has dismissed a Chief Minister on this ground in spite of the fact that some of the Governors knew that the Chief Minister was corrupt.

It should, however, be noted in this connection that whenever the Governor withdraws his pleasure, his decision is final and it cannot be challenged in any court of law. When the Governor of West Bengal sacked the Ministry of Ajoy Mukherjee by withdrawing his pleasure, his decision was challenged in the Calcutta High Court. Justice B.C. Mitra "held that the Governor had absolute, exclusive, unrestricted and unquestionable discretionary

power to dismiss a Ministry and appoint a new Council of Ministers under article 164 (1) of the Constitution.... It was further held that article 164 (1) provided that the Ministers should hold office during the 'pleasure' of the Governor and this exercise of 'pleasure' was not fettered by any condition or restriction. Withdrawal of 'pleasure' was entirely at the discretion of the Governor. The provision of article 164 (2) that the Ministers should be collectively responsible to the Legislative Assembly of the State did not in any manner fetter or restrict the Governor's power to withdraw the 'pleasure' during which the Ministers held office. Collective responsibility contemplated in article 164 (2) meant that the Council of Ministers was answerable to the Legislative Assembly of the State. The Constitution did not confer any power on the Legislative Assembly to dismiss or remove from office the Council of Ministers. The power to appoint the Chief Minister and the Council of Ministers on the advice of the Chief Minister and the power to remove the Ministers from office by withdrawing the 'pleasure' contemplated in article 164 (1) were conferred upon the Governor exclusively. This right was absolute...The Governor had powers to appoint also under article 165 (1) and 310 which powers were conditional and restrictive and could be challenged in certain cases. But in exercise of powers under article 164 (1) the Governor's withdrawal of 'pleasure' could not be questioned."[83]

UNDER ARTICLE 356

For the dismissal of a Ministry, withdrawal of a pleasure by the Governor under article 164 (1) is not the only method used in the States. The Governor can also get the Ministry elbowed out by reporting under Article 356 that the Government of the State is not being carried on in accordance with the provisions of the Constitution. This report can be made by the Governor even when the Chief Minister has a majority in the Assembly. The Namboodiripad's Ministry in Kerala (1958), the Rao Birendra Singh's Ministry in Haryana (1968) and Charan Singh's Ministry in UP (1970) were got dismissed when they had majority in the Legislative Assemblies. Here it should be remembered that the action of the President invoking article 356 is not justiciable and what constitutes a failure of the constitutional machinery has not been authoritatively defined any where. However, the Administrative

Reforms Commission has listed the following three grounds (which according to the Commission itself are not comprehensively listed) for invoking the Presidents rule.

> "(a) Where there has been a 'political breakdown' e.g., where a Ministry has resigned and an alternative Ministry cannot be formed without holding a fresh election; or where the party in majority refuse to form a Ministry and a Coalition Ministry able to command a majority in the Legislature cannot be formed;
>
> "(b) Where a Ministry, although properly constituted, violates the provisions of the Constitution or seeks to use its constitutional powers for purposes not authorised by the Constitution and other correctives or warnings fail;
>
> "(c) Where a State fails to comply with any direction given by the Union in the exercise of its executive power under any of the provisions of the Constitution."[84]

This list, as the ARC has itself accepted is not a very exhaustive list and the Governor may on grounds other than these, recommend the failure of the constitutional machinery as it happened in UP in Charan Singh's case. Charan Singh although had a majority in the Assembly, still he was asked by the Governor to resign[85] because the Congress party which was the major partner in the coalition Government withdrew its support and the Ministers of the Congress party refused to resign when asked by the Chief Minister. When the Chief Minister recommended to the Governor that they should be dismissed, the Governor asked him to resign. When Charan Singh refused to oblige the Governor by submitting his resignation, he recommended the failure of the constitutional machinery and he did not allow the Chief Minister to face the Assembly which was to meet on October 6, 1970 and the President's rule was imposed on "2nd October when the Assembly was to meet within 72 hours." On the top of that Charan Singh had promised to convene the Assembly within 24 hours.[86] This shows that the Governor may get the Ministry dismissed under article 356 and thereby may prevent the Chief Minister to face it, even after it has been summoned and thus may violate the recommendations of, the Governors' Committee, the Administrative Reforms Commission and the Speakers' Conference.

It is interesting to know that while recommending the President's rule, the Governor of UP in his report to the President said that "the Chief Minister of a coalition Government cannot be treated at par with the Chief Minister of a single party majority Government in the matter of removal of Ministers or reconstruction of the Council of Ministers which involves a fundamental change in the complexion of the Government."[87]

Now question arises, as to how far was it constitutionally proper for the Governor to ask the Chief Minister to resign simply because the major partner in the coalition had withdrawn support and the Ministers of that party had refused to resign.

According to the recommendations of the Governors' Committee: "What happens if a coalition breaks-up and the Chief Minister demands the resignation of his colleagues with whom he is no longer in accord without submitting his own resignation as had happened with the former UP Chief Minister, Mr Charan Singh?

A Chief Minister in a coalition Ministry derives his pre-eminence solely from the agreement among the partners. When a Chief Minister heads a single party Government, his pre-eminence is unquestioned. A Chief Minister is the keystone of the arch of the Cabinet but this can apply only when he heads a team which collectively has majority support in the Legislature. Thus the Chief Minister in a coalition cannot claim the right of advising the Governor in the matter of appointment and dismissal of Ministers in such a manner as to break the arch and yet claim the right to continue as Chief Minister.

It is clear that he cannot break-up the coalition by seeking to dismiss the Ministers representing the partnership and yet claim to remain in office.

If some Ministers in a coalition belonging to a particular party or a group, themselves resign due to disagreement with the Chief Minister, the Chief Minister may not necessarily resign. If, however, his majority in the Assembly is threatened by the resignations, it would be expected of him to demonstrate his continuing strength in the Assembly by advising the Governor that the Assembly be summoned within the shortest possible time and its verdict be obtained in his favour."[88]

The Chief Minister in coalition Governments having majority in the Assembly are of the following five types:

(1) The Chief Minister may belong to the largest party in the two party coalition as Parkash Singh Badal was in Jana Sangh, Akali coalition in Punjab and R.N. Singh Deo in Orissa in Swatantra, Jana Congress coalition in 1967. In Orissa in 1960 in Congress-Ganatantra Parishad coalition, Dr Hare Krushna Mahtab belonged to Congress, the largest of the coalition partners.

(2) The Chief Minister may belong to the smaller party in a two party coalition as Charan Singh was in B.K.D., Congress coalition in UP.

(3) The Chief Minister may belong to the largest party in a multi-party coalition as T.N. Singh was in UP in 1970. He belonged to Congress (O) the largest group in the coalition. Since early in 1967 in Kerala Namboodiripad belonged to the largest group.

(4) The Chief Minister may belong to the smallest party in a multi-party coalition as Ajoy Mukherjee was in West Bengal in 1967 or Biswanath Das was in Orissa in 1972 (who was an independent).

(5) In a multi-party coalition Government the Chief Minister may belong neither to the largest party nor to the smallest party. For example, in February 1960, in Kerala, there was a coalition Government consisting of Congress, the P.S.P and the Muslim League, having 63, 17 and 11 MLAs respectively and the Chief Minister Mr. Pattom Thanu Pillai belonged to PSP[89]. Similar was the position of Achutha Menon in Kerala in 1971. It was a coalition Government consisting of Congress (R), CPI the Muslim League, RSP and the PSP having 30, 17, 11, 6 and 3 members respectively.[90]

(6) The minority Chief Minister of a two party coalition Government, Sardar Lachhman Singh Gill, was in Punjab. His coalition Government consisted of the Janta Party and the Republican party members.

Now according to the new theory that has been expounded by Dr Gopala Reddy is that if the coalition having a majority in the Assembly breaks and some of the Ministers resign, there is no constitutional crisis because then the Chief Minister may be asked to face the Assembly as was done in Punjab,[91] West Bengal[92] and Orissa[93]. Similarly if there is a two or multi-party minority coalition and if the parties which are extending support from outside, withdraw their support even then the Chief Minister should be asked to face the Assembly. It seems that if the

Ministers of the Congress party in Charan Singh Cabinet had resigned then also, perhaps, there would have been no constitutional crisis except that the Chief Minister would have been asked to face the Assembly. For instance, while speaking in defence of Dr B. Gopala Reddy in Charan Singh's case, A.K. Sen, the former Law Minister said that there was no crisis in Punjab when Jana Sangh withdrew its support because the Jana Sangh Ministers resigned and hence the Government could continue till the Assembly met[94] and perhaps the same logic could have been applied to Charan Singh's case also.

But the actual crisis in UP arose because the Congress party which was the major partner in the Ministry withdrew its support and the Congress party Ministers refused to resign. But what would have been the position, if the Jana Sangh in Punjab would have withdrawn support from the Ministry of Badal and its Ministers would not have tendered resignation? Would it not have been the constitutional crisis of the same type as in UP, with the only difference that in this case it would have been a minor partner whereas in UP it was the major partner which withdrew the support, and that difference looses its significance when we consider the effects of the withdrawal of that support on the Ministry. The net result of the withdrawal of the support in both cases would have been that the Chief Minister apparently would have lost his majority in the Assembly and in such a situation he would have been asked to face the Assembly if he wanted to continue in office or he should have resigned. Hence, whether it is the major partner in the coalition or the minor partner which withdraws the support that does not matter because the consequences are the same and, therefore, the theory that when a major partner in the coalition withdraws the support and if its Ministers do not resign, then the Chief Minister should be asked to resign, seems to be untenable. Shri Nath Pai while commenting on Charan Singh episode said that "the crisis in UP has given a jolt to the principles of collective responsibility of a Cabinet. There can be a crook in every Cabinet who can cock a snook at a Chief Minister or the Prime Minister and go and report to the Governor or the President as the case may be, 'I have some people with me.' Anybody can find some people with him either at the State level or at the Central level—will it be justification to encourage that particular individual? Since

you have come out against your Prime Minister or the Chief Minister, I will dismiss the Prime Minister or the Chief Minister, as the case may be. This is what precisely has been happening. It is holding the doctrine of collective responsibility to ransom. But allowing individuals to go and tell at the Governor's palace that 'I have some followers, dismiss the Chief Minister,' is a very dangerous and pernicious principle."[95]

Therefore, it seems that in Charan Singh's case, the Governor should not have asked the Chief Minister to resign. He, however, could have asked him to face the Assembly.

This theory is also untenable in the sense that the acceptance of this principle would mean that in a coalition the Chief Minister would remain in office not so long as he enjoys the confidence of the House (there might be some invisible supporter of the Chief Minister in the opposition) but only so long as he enjoys the confidence of the major partner in the coalition which is the violation of article 164 (2) of the Constitution.

The absurdity of this principle will become crystal clear if we take into consideration the fact that initially Charan Singh formed a one party minority Government and it was only after two months that the Congress (R) joined the Government and formed a coalition. The moment the Congress withdrew suppport the *status quo ante* was restored and it again became a minority Government. Had Charan Singh's minority Government continued, would it have been possible for the Congress (R) to overthrow it particularly when the Congress (O) and Swatantra whose combined strength was more than the Congress (R), were prepared to support it? Is it not strange that what the Congress party could not have done from outside, it had done from inside because then the Governor would not have been in a position to interpret the Constitution in this way.

Though the Governors under article 164 (1) can dismiss the Ministry by withdrawing his pleasure and can also get it dismissed under article 356, yet it will be better if they follow the advice of M. Ananthasayanam Ayyanger, the former Governor of Bihar, also the former speaker of Lok Sabha, and a former member of the Constituent Assembly who says that "the function of the Governor as a constitutional head of the State was to interpret the Constitution for the sake of safeguarding democracy and not to jeopardise it. The Governor should install the Ministry but should not

befall it by dragging its legs. Dragging the legs of the Ministry would not be in consonance with the Constitution. The Governor should uphold democracy and should not wreck it...The office of the Governor should not be guided by political considerations."[96]

In the end it can be said that unless the Governors sustain a democratically elected Ministry through their constructive opinions and so long as they remain an instrument to topple the Ministries brought to power through the process of elections, democracy seems to be in danger.

EFFECTS OF THE DISMISSAL OF A CHIEF MINISTER ON THE MINISTRY

Whenever, a Minister is dismissed, the position of other Ministers remains unaffected. But what will happen to the Ministry if the Governor dismisses the Chief Minister. The situation arising out of the dismissal of the Chief Minister may be considered more or less similar to that arising upon the death or the resignation of the Chief Minister. At the Centre two of the Prime Ministers, namely Pandit Jawaharlal Nehru and Lal Bahadur Shastri have died in office and both the times Gulzari Lal Nanda who was number two in the respective Cabinets, was appointed as the Prime Minister of the care taker Government and the Cabinet was administered a fresh oath of office. The same process was adopted in Bihar in 1961 after the death of Sri Krishna Sinha[97] and in Madras in 1969, after the death of Annadurai.[98] The same practice has been followed in the States, whenever, the Chief Ministers have resigned. For instance, when late Sardar Partap Singh Kairon resigned in 1964 from the office of the Chief Minister because of the Das Commission Report, Dr Gopi Chand Bhargava was appointed as the Chief Minister of the care taker Government and all the Ministers took fresh oath of office. The same process was adopted when under Kamraj Plan when six Chief Ministers resigned.

There are, however, some notable exceptions to this general rule. For instance, after the death of Dr B.C. Roy, the West Bengal Chief Minister in 1963, his Council of Ministers did not cease to exist and the Governor of West Bengal asked "the Ministers to carry on their work until a new Ministry was formed. It is presumed that the Ministers informed the Governor that P.C. Sen was the senior most in their ranks and would perform

the functions of the Chief Minister as he had done when Roy went out of the country. This caused the phrasing of the statement in the Press that P.C. Sen had been appointed "acting Chief Minister."[99]

The same practice was followed in PEPSU in 1955 and in Madhya Pradesh in 1956 when the Chief Ministers of those States died.[100] In these cases no fresh oath of office was administered to the members of the Cabinet and therefore, technically they did not cease to be Ministers. It may, however, be asked as to how far were the actions of the Governors of West Bengal, PEPSU and Madhya Pradesh were constitutional? According to one school of thought, with the death of the Chief Minister the Ministry stands automatically dissolved and the power reverts to the Governor, who should appoint a care taker Government which must take a fresh oath of office. A question was once raised in Sindh whether other Ministers stood dismissed when the Chief Minister alone was dismissed and the decision then was that they should be treated as dismissed.

But according to the other school of thought, "Ministers do not cease to be Ministers because one of them (even if he is a Chief Minister) has died. Each Minister is individually answerable to the Legislature and advises the Governor who acts on that advice ..According to constitutional Pandits, the Governor of West Bengal acted rightly in asking the Ministers to carry on their work until a new Ministry was formed."[101]

If this contention is accepted, then the Ministers will not cease to be Ministers, if the Chief Minister is dismissed. But it is really very difficult to agree with this view. Firstly, because the acceptance of this principle would mean that if the Chief Minister resigns the other Ministers would continue to remain in office and that would be an absurd situation. Secondly, it would mean that the Chief Minister would not be in a position to reconstitute his Cabinet even by resigning and thirdly, when a person on whose recommendation they have been appointed, if he goes out of the office, how can they remain in office ? Hence, Dr K.V. Rao seems to be right when he says that when the head is dismissed the tail cannot function.[102] It will not be out of reach to mention here that Ajoy Mukherji in his letter of resignation to the Governor said that, "I, hereby, tender my resignation of the office of Chief Minister of West Bengal. As

IV

Appointment and Dismissal of Ministers

APPOINTMENT

According to article 164 (1) "the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister and the Ministers hold office during the pleasure of the Governor.

"Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister incharge of tribal welfare who may in addition be incharge of the welfare of the Scheduled Castes and backward classes or any other work.

"(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

"(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.[1]

"(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

"(5) The salaries and allowances of Ministers shall be such as the Legislature may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule."

This Article shows that the Ministers are to be appointed only on the recommendation of the Chief Minister and the expression 'shall' in Clause (1) of Article 164 is mandatory[2] and not directive and it is not necessary for a Minister to be a member of either House of the State Legislature at the time of his appointment as a Minister. In case, if any person who is not a member of the State Legislature, is appointed as a Minister, he will cease to be a Minister after the expiration of six months unless he becomes the member of the State Legislature within this

period. It may, however, be asked as to how far will it be constitutionally proper to reappoint a person as a Minister again immediately after he has ceased to be a Minister on the ground that he could not become a member of the State Legislature within a period of six months prescribed by the Constitution. This question arose in Bihar in the case of B.P. Mandal and it has been discussed in detail in the Chapter on the appointment of the Chief Minister.

About the appointment of other Ministers, it may, however, be asked as to how far is it possible for the Governor to influence the Chief Minister in the appointment of other Ministers. Ordinarily, when one of the political parties has a clear cut majority and a clearly recognised leader, the Governor will have no say, when the Governor and the party in power belong to different political parties unless, however, the Chief Minister himself allows him to suggest some names.[3] If however, the Governor and the Chief Minister belong to the same political party, then it will, to a great extent, depend upon the personal equation of the Governor with the Chief Minister. If the Chief Minister has a regard for the Governor, he may include some of the persons suggested by him in the Cabinet. In fact, immediately after the Independence, in some of the States, the Chief Ministers used to consult the Governors in the formation of their Cabinet and usually one or two persons were taken in the Cabinet on the advice of the Governor. Sri Prakasa who had been a Governor of Madras, Bombay (now Maharashtra) and Assam, writes that "Both in Assam and in Madras, I found in early days, the Chief Ministers used to consult the Governor about the Ministers they were intending to take. Not unoften they took one or two Ministers on the advice of the Governor even if they had not thought of themselves."[4] This was done in UP also when Biswanath Das was the Governor.[5]

In case, if none of the political parties has a clear cut majority in the Assembly, then again the Governor may not be in a position to influence the appointment of Ministers if a hostile coalition comes into power as it happened in West Bengal when Dharam Vira was the Governor. In such a coalition, in fact, even the Chief Minister does not have much say in the appointment of Ministers because, the Ministers usually are the nominees of the political parties. If, however, there is no such pre-existing coalition and none of the political parties has a clear cut majority, then

the Governor gets a chance of assessing the claims and also counter-claims of various contenders for the office of the Chief Minister. While doing so the Governor may, perhaps have some influence on the appointment of the Ministers in the sense that before deciding the claim to invite any leader for the formation of a Ministry, if he suggests a name out of the members who are supporting that leader, the would be Chief Minister may like to oblige the Governor. Though it would be very unusual on the part of the Governor to do so, yet it is not an impossibility particularly when some of the Governors do indulge in the politics of this type.

Though ordinarily the Governors do not have a say in the selection of the Ministers and they are the nominees of the Chief Minister, but that does not mean that the Chief Minister has a completely free hand in the appointment of other Ministers because the Governor though in a very rare and exceptional circumstances may play a negative role at least. For instance, if the Chief Minister wants to include such a person in his Cabinet who has been found to have practised corruption as a Minister, the Governor may have to think many a times before administering oath of office and secrecy to him[6] and if he refused to do so then perhaps it may not be unconstitutional. It is interesting to know that in Bihar R.D. Bhandare the Governor refused to administer the oath of office as Ministers to Ram Raj Singh and Radhanandan Jha who had earlier refused to resign, when asked by the Chief Minister and who had subsequently criticised the Governor for permitting Kedar Pande, the Chief Minister to reconstitute his Ministry after dropping them. They were administered oath only after they had apologised in writing to the Governor for criticising him.[7] But ordinarily the Governor would do so only when he is sure that by his action, there would not be any constitutional crisis in the first instance and secondly, when he knows that he has the support of the Government of India.

It may, however, be mentioned here that to refuse to administer oath of office to a person who has been found guilty of corruption while in office, is one thing and to administer an oath of office to a person who has been dismissed as a Minister because of his differences with the Chief Minister or dismissed as a Chief Minister on grounds other than corruption is another. The examples of Rao Birendra Singh[1] in Haryana and that of Ajoy Mukherjee[8] in West Bengal can be cited in this respect. When the Governor is

called upon to administer oath of office to such persons there is no violation of his oath of office.

It may, however, be asked in this connection as to how far will it be possible for the Governor to refuse to administer oath of office and secrecy under article 164 (3) to a person recommended by the Chief Minister on grounds other than corruption. Though ordinarily it is expected that the Governor will not do so, however, there are instances where the Governor seems to have done so. For example, when some of the Sant Akali MLAs defected to Gurnam Singh Akali Dal in Punjab, the strength of the party in power decreased from 54 to 51. It was "reliably learnt that Badal wished to swear in one or two Ministers.... but the Governor did not accept the proposal.[10] Pavate at the time of his retirement as Governor confirmed this fact when he said that "the Governor had to do his own thinking in the interest of the people. He was not bound to accept every one as Minister on the advice of a Chief Minister."[11] B. Gopala Reddy agrees with this when he says : "he had allowed C.B. Gupta to expand his Ministry as it was in accordance with the Constitution." He had not till then any written information that the Government was in a minority."[12] By implication it means had it been in the knowledge of the Governor in writing that C. B. Gupta was in a minority, he might have refused to allow the Chief Minister to expand his cabinet. It will, however, not be out of place to mention here that it remains yet to be seen when some of the Governors may refuse to administer the oath of office and secrecy as a Minister to a person who is a frequent and notorious defector.[13]

SIZE OF THE MINISTRY

It should be noted that so far as the size of the Ministry is concerned, usually it is the Chief Minister who decides about it. It may be mentioned here that uptil now there is no all India policy about the size of the Ministry, though sometimes a suggestion has been made that the maximum number of Ministers should not be more than 10% of the strength of the members of the State Legislature when it is bi-cameral and not more then 11% when it is unicameral. But in spite of this, it seems that the Governor, if he is convinced that the further expansion of the Ministry will, make the size of the Ministry ridiculously large, may refuse to administer oath of office and secrecy as a Minister to a person recommended

by the Chief Minister. It will not be out of place to mention here that Shri B.N. Chakravarti, the Governor of Haryana, while recommending the dismissal of the Rao Ministry, wrote to the President that "the Government has also sought to maintain itself precariously in power by creating too many Ministers which is an abuse of its constitutional powers. Such a large number of Ministers and Parliamentary Secretaries numbering at one stage 23 out of ruling party's strength of 41 and 22 now out of total strength of 40 cannot be justified on any grounds of administrative requirement. The position is even worse if it is remembered that the 10 Jana Sangh members in the Samyukta Dal, have not accepted any office as Ministers, so that in reality 22 out of the 30 remaining MLAs are holding office."[14]

Such a big size of the Ministry was considered as a misuse of the constitutional powers according to Shri B.N. Chakravarti, the Governor of Haryana, and there may perhaps be some justification for it[15]. But it will not be out of place to mention here that in Punjab when Gill was the Chief Minister, 16 out of the total of 19 members of the Janta Party were Ministers (82%) and even the remaining three perhaps would have been made Ministers but for the opposition of the Congress party because they defected from the Congress. That means all the eligible members of the Janta Party and Republican Party were provided with the office in the Ministry but still the Governor did not consider it as the misuse of the constitutional powers. Similarly in West Bengal after the dismissal of the Ministry of Ajoy Mukherjee, P.C. Ghosh was installed as Chief Minister and out of 17 defectors 10 were made Ministers (59%). In this case also it was not considered a misuse of the constitutional powers. Hence, the approach of the Governors towards the size of the Ministry is not uniform and it was because of this reason that Shri Sezhyan said in the Lok Sabha that "what has been applied in Haryana, should it not have been applied to Punjab also? Is it not against all canons of democratic procedure? Thus the standard varies from State to State."[16] It may also be asked in this connection, if it is a misuse of constitutional powers to have a large size Cabinet, then why should the Governors allow this misuse and why should they ignore it particularly when the Congress supported this type of Ministries as it happened in Punjab when Gill was the Chief Minister and in West Bengal when P.C. Ghosh was the Chief Minister ?

DISMISSAL OF A MINISTER

A Minister after his appointment holds office during the pleasure of the Governor. According to the British practice "not only is the Prime Minister the sun around whom the planets revolve, he has also got the power of designating who the planets should be and then to change the interplanetary position of the various planets or to drop them out of the solar system."[17] In England "if the Prime Minister finds a particular Minister unsuitable for the task for which he is appointed or is a person who is likely to rock the boat, it is the prerogative of the Prime Minister to ask that Minister to resign."[18]

But what is the position in India. According to the Punjab High Court "it is open to the Governor under the Constitution to dismiss an individual Minister at his pleasure."[19] Ordinarily in India, the pleasure of the Governor in this respect means the pleasure of the Chief Minister because when the Chief Minister asks a particular Minister to resign and if he does not do so, then he can advise the Governor to dismiss him. This happened in the case of Rao Birendra Singh in Punjab in 1961. Sardar Partap Singh Kairon, the then Chief Minister asked him to resign but when he refused to do so, the Chief Minister advised the Governor to dismiss him and as a result thereof, Rao Birendra Singh was dismissed.[20] Similarly a Minister was dismissed in 1964 in Bombay.[21] Even recently in Himachal the State Deputy Minister, Daulat Ram Sankhyan was "dismissed from office by the Governor on the advice of the Chief Minister.[22] Thus ordinarily the Ministers are dismissed by the Governor on the recommendation of the Chief Minister. But this practice may not always be followed in all the cases and there are examples where the Governor has refused to dismiss some of the Ministers in spite of the recommendation of the Chief Minister. This happened in UP in Charan Singh's case. Charan Singh formed the Ministry after the fall of the Ministry of C.B. Gupta because of the split of the Congress between Indicate and Syndicate groups. It was a single party minority Government which came to power because the Congress (R) gave verbal assurance to the Governor to support the Government of Charan Singh. After two months the Congress joined the Cabinet and thus BKD Congress coalition Government came into existence. But after some time there were differences between the BKD and the Congress and as a result thereof Charan

Singh asked the Ministers of Congress party to resign but they refused to do so.[23] Thereupon Charan Singh advised the Governor to relieve them and to handover, their departments to him.[24] The Governor accepted the advice of transferring the departments of these Ministers to the Chief Minister but did not relieve the Ministers of their offices and allowed them to stay as Ministers without portfolio.[25] The Governor not only refused to relieve them but even asked the Chief Minister to resign.[26] When the Chief Minister refused to do so, the Governor recommended the dismissal of the Ministry and the imposition of the President's rule under Article 356.[27] On the basis of this recommendation the President's rule was imposed.

Whether the Governor should have retained the Congress Ministers in office without portfolios after the Chief Minister has requested the Governor to relieve them, it may be submitted that in such matters ordinarily the Governor should go by the advice of the Chief Minister. But the Governor gave the following reasons for the non-acceptance of this advice:

(1) "Had it been on the basis of misconduct, misdemeanour or abuse of power, he would have agreed to their dismissal."[28]

(2) "The Chief Minister of a Coalition Government cannot be treated at par with the Chief Minister of a single party majority Government in the matter of removal of Ministers, or reconstitution of the Council of Ministers which involves a fundamental change in the complexion of the Government."[29]

(3) "Shri Charan Singh could not be permitted to construct a new edifice on the debris of the old one and that he should have followed the time honoured practice of resigning with a view to reconstitute the new Government."[30]

The first argument seems to be untenable because, it does not have the support of the constitutional authorities. Sir Ivor Jennings says in his famous book *Cabinet Government* that "it must be remembered too that the Prime Minister's decision to bring about a change of Ministers is not necessarily on accusation of incompetence or bad administration, it might be due to political conditions."[31]

It will not be out of place to quote Sir Winston Churchill here, who observed that "the power to form Government and to decide on resignations clearly indicates a similar capacity to promote or

dismiss ministers during the life time of a Government and it has well been said that "Prime Ministers are apt to be autocratic in disposal of their Ministers and there is no other way by which the practice could operate."[32] Shri P.K. Deo seems to be right when he says that the "constitution of the Cabinet is the prerogative of the Chief Minister under article 164 of the Constitution. The power of the Chief Minister with regard to the appointment of Ministers carries with it the necessary implication of the Chief Minister's right to advise the Governor with regard to the dismissal of a Minister and that advice is equally binding on the Governor. As has been pointed out, the reconstitution of the Cabinet has always been an inherent right and prerogative of the Chief Minister and the Governor is bound to accept it."[33]

Secondly, the Governor has tried to make a fine distinction between a single majority party Chief Minister and a coalition party Chief Minister but the distinction so made, it seems, is not very sound so far as the constitutional relationship between the Chief Minister and other Ministers goes. There is no difference between the single majority party Chief Minister and the coalition Chief Minister so far as the appointment of other Ministers and the distribution of portfolios is concerned. There may be some understanding among the political parties forming the coalition but the Governor does not come into the picture. The impact of the resignation, defeat or the dismissal of the Chief Minister on the Council of Ministers in both the cases is the same. The relationship between the Governor and the Chief Minister, whether he belongs to the single majority party or a coalition is the same so long as he has the confidence of the Assembly. If the coalition Chief Minister recommends a member of a particular party to be included in the Cabinet, the Governor cannot refuse to administer him oath of office particularly when the size of the Ministry is not very large. Similarly, the Governor will have to give him the portfolio recommended by the Chief Minister. It means if a purely constitutional view is taken then there is no difference between the coalition Chief Minister and the one party Chief Minister so far as their relations with the Governor or with the other members of their Cabinet are concerned. Hence this difference between the coalition Chief Minister and one party majority Chief Ministers seems to be misleading so long as they have majority in the Legislature and Acharya J.B. Kirpalani seems

to be right when he says that "the UP Governor's discretion was without any foundation and not borne out by any example any where in the world."[34]

It seems strange that A.K. Sen, the former Law Minister, Government of India, while supporting the action of Dr B. Gopala Reddy, the Governor of UP in Charan Singh's case said that "a Ministry was a unit of collective responsibility and it could act collectively. But when the split between the Congress (R) and the BKD took place, there was only a splinter group left in power... The Governor was not bound to consult just a splinter group on how he should act. He therefore, applied his own mind and also consulted the Attorney General."[35] Whether the Governor should have acted on the advice of the Chief Minister or not should have been decided not on the ground that Charan Singh was heading a splinter group but on the basis whether Charan Singh had a majority in the Assembly or not, and when the Governor was assured in writing by other parties that they were supporting the Chief Minister and hence he had a majority, why should the Governor or any body else call it a splinter group. Since the Chief Minister had a majority in the Assembly, hence, the Governor, it seems should have accepted the advice of the Chief Minister and should have dismissed the Ministers. Here it should be noted that the Chief Minister remains in office so long as he enjoys the confidence of the Assembly and not only so long as he enjoys the confidence of his Council of Ministers.

Again it seems strange that the Governor relieved the Ministers of their portfolios on the recommendation of the Chief Minister but he was not prepared to dismiss them. One cannot have a cake and eat it too. How is it that the Governor accepted Charan Singh's advice in relieving them of their portfolios but not his advice of dismissing them ? It is interesting to note that Charan Singh demanded the resignations from the Congress Ministers on October 24, 1970 and the same day in the evening the leader of the Congress Legislature party, Kamlapati Tripathi wrote a letter to the Governor informing him that his party is withdrawing support. But still till 27th the Governor accepted Charan Singh as a Chief Minister because on 27th the Governor deprived those Ministers of their portfolios on the advice of the Chief Minister. If his advice as a Chief Minister in this respect was accepted by the Governor, then why not his advice about

their dismissal? P. Govinda Menon, the former law Minister, while defending K.C. Reddy in Mishra's case said that "D.P. Mishra till he is proved not to have a majority—is the Chief Minister of the State. So sir, the Governor was in his right to heed to his advice."[36] Did this logic not apply in Charan Singh's case?

The last argument that Shri Charan Singh cannot be allowed to construct a new edifice on the debris of the old one, also perhaps cannot be accepted. The acceptance of this principle would mean that in future the Governors would decide as to which of the parties should remain partner in the coalition and which of them should not be allowed to enter the coalition.

It may, however, be mentioned in this connection that the Governor should not have asked the Chief Minister to resign, and when the Governor has refused to dismiss the Ministers then the Chief Minister should have either resigned and reconstituted the Government[37] or he should have continued with inconvenient Ministers. These were the only two alternatives open to him.

DISTRIBUTION OF PORTFOLIOS

Besides appointing Ministers, the Governor distributes portfolios among the Ministers on the recommendations of the Chief Minister. Whenever, the Minister hands over charge of his portfolios to another Minister for a temporary period with the permission of the Chief Minister, the Governor has to be informed. West Bengal Governor S.S. Dhavan wrote a letter to the Chief Minister, expressing his "displeasure" at the way State Ministers were transferring their portfolios temporarily to their Ministerial colleagues without reference to the Chief Minister. Mr Mukherjee told newsmen, the Governor had pointed out, quoting relevant articles of the Constitution, that individual Minister had no right to handover charge of their respective portfolios to their colleagues in the Ministry even for a temporary period. He said, the Governor in his letter has asked to ensure that individual Ministers when unable to take care of their portfolios because of leave or any other reason, handover charge of their respective departments to the Chief Minister, who in turn might allocate the portfolio to other Ministers and while doing so would immediately inform the Governor of the change. He said, the Governor had sent the letter after reports had appeared in the press that Deputy Chief Minister Jyoti Basu and some other Ministers were

handing over charge of their respective portfolios to their Ministerial colleagues without reference to the Chief Minister."[38]

NOTES

1. "I, A.B, do ——— swear in the name of God / solemnly affirm ——— that I will bear true faith and allegiance to the Constitution of India as by law established, (that I will uphold the sovereignty and integrity of India) that I will faithfully and conscientiously discharge my duties as a Minister for the State of... and that I will do right to all manner of people in accordance with the Constitution and the Law without fear or favour, affection or ill will."
2. "The Constitution says there 'shall be a Council of Ministers'. Normal grammatical meaning of 'shall' is mandatory." Justice Hegde, *Statesman*, February 16, 1971, p. 6.
3. For example, Annadurai, when he formed his first ever D.M.K. Ministry in Madras, in 1967, discussed his list of Ministers with Ujjal Singh, then their Governor and accepted some of the suggestions made by him in this respect. *Journal of Society for Study of State Governments*, Vol. IV, Nos. 3 & 4, July-December 1971, p. 354.
4. Sri Prakasa, *State Governors in India*, 1966, p. 22.
5. *Journal of the Society for the Study of State Governments*, Vol. IV, Nos 3 & 4 July-December 1971, p. 354.
6. Here it may be mentioned that late Sardar Partap Singh Kairon when he was the Chief Minister of Punjab and H.K. Mahtab and Biren Mitra the former Chief Ministers of Orissa were found to be corrupt by the Commissions appointed against them. Will the administration of oath of office to such persons, not be a violation of the oath of office that the Governor takes?
7. *Tribune*, May 31, 1973, p. 1.
8. Rao Birendra Singh who was a Minister of Revenue and Sports and Consolidation in Punjab was dismissed by the Governor on August 17, 1961 because he refused to accept the advice of the Chief Minister to tender his resignation when he was having differences with the Chief Minister. Shri Rao became the Chief Minister of Haryana in 1967.
9. The Ministry of Ajoy Mukherjee in West Bengal was dismissed in November, 1967 when he refused to summon the session of the Assembly on the advice of the Governor. But when the mid term poll took place, the United Front headed by him again came into power and the same Governor Dharam Vira had to reappoint him as a Chief Minister.
10. *Tribune*, July 2, 1970, p. 1.
11. *Tribune*, May 20, 1973, p. 1.
12. *Statesman*, November 30, 1969, p. 1.
13. The Governor of Haryana, Shri B.N. Chakravarti while recommending the dismissal of Rao Birendra Singh Ministry, in his report to the

President wrote, "Defection particularly the one by Mr. Hiranand Arya after remaining as a Minister for five days have made a mockery of the Constitution." Should the Governor allow the mockery making of the Constitution by administering oath of office and secrecy as a Minister to such persons? Will it not be the violation of the Governor's oath, if he does so?

14. *Tribune*, November 22, 1967, p.3.
15. Rao Birendra Singh defended his action on the ground that the Congress cabinet formed by Bhagwat Dayal Sharma after the formation of Haryana in November 1966 consisted of 24 members in a House of 54 in which Congress had a strength of 41 members. *Asian Recorder*, December 10-16, 1967, p. 8066.
16. *Lok Sabha Debates*, 4th Series, Vol. 10, Nos. 11-15, December 1, 1967, Cols. 4286-87.
17. Justice J.L. Kapur, former Judge of the Supreme Court, *National Herald*, July, 20, 1970, p. 6.
18. *ibid.*, July 21, 1970, p. 5.
19. Tara Singh Vs. Director, Consolidation of Holdings, *AIR*, 1958, Punjab, 304.
20. *Tribune*, August 17, 1961.
21. K. V. Rao, *Parliamentary Democracy in India*, 2nd ed., 1965, p. 74.
22. *Statesman*, February 11, 1972, p. 1.
23. *Lok Sabha Debates*, Vol. XLV, Nos., 1-10, November 19, 1970, Cols. 281-82.
24. *ibid.*
25. *ibid.*
26. *ibid.*, Col. 298
27. *Hindustan Times*, October 3, 1970, p. 1.
28. Quoted by Shri Mursoli Moran, *Lok Sabha Debates*, Vol. XLV, Nos. 1-10, November 19, 1970, Col. 346.
29. Quoted by Atal Behari Vajpayee, *ibid.*, Col. 343.
30. Quoted by K C. Pant, *ibid.*, Cols. 416.
31. *Lok Sabha Debates*, Vol. XLV, Nos. 1-10, November 19, 1970, Col. 346.
32. Quoted by Justice J. L. Kapur, former Judge, Supreme Court, *National Herald*, July 20, 1970, p. 5
33. Shri P.K. Deo, *Lok Sabha Debates*, Vol. XLV, Nos. 1-10, November 19, 1970, Cols. 321-22.
34. *Statesman*, November 20, 1970, p. 9.
35. *ibid.*
36. *Lok Sabha Debates*, 4th series, Vol. 7 Nos. 41-45, July 20, 1967, Col. 13435.
37. This method was adopted by Bhim Sen Sachar in Punjab when he dropped Sri Ram Sharma and by Rao Birendra Singh in Haryana when he dropped Chand Ram and Mani Ram Godhara of Devi Lal Group. *Tribune*, November 22, 1967, p. 3.
38. *Hindustan Times*, January 1, 1970, p. 7.

V

The Governor and the Advice of the Council of Ministers

MODE OF EXERCISING EXECUTIVE POWER

According to Article 154 (1) of the Constitution :

"The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through the officers subordinate to him in accordance with this Constitution.

"(1) Nothing in this article shall :

(a) be deemed to transfer to the Governor any functions conferred by any existing Law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by Law functions on any authority subordinate to the Governor."

Besides this, according to Article 163 (1) :

"There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

"(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of any thing done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

"(3) The question whether any, and if so what advice was tendered by Ministers to the Governor shall not be enquired into in any Court."

So far as the executive powers are concerned Clause (1) of Article 154 says that "the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through the officers subordinate to him." It may be mentioned here that "in a written Constitution the executive powers must be such power as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing laws."[1] Article 162 says that "the executive power of a State shall extend to the matters with respect to which the Legislature of the State has the power to make laws..." It means executive power of the State is co-terminus with the Legislative power of the State and this executive power is to be exercised by the Governor either directly or through the officers subordinate to him. But the question arises : does the expression "Officers subordinate to him" include the Ministers ? Answer is in the affirmative. In Tara Singh Vs. Director of Consolidation of Holdings, B. Narain, Judge of the Punjab High Court has held that : "there can be no doubt that a Minister is subordinate to the Governor. The Governor is the executive head of the State and this position he does not share with the Chief Minister. He allocates his executive duties to various Ministers under Article 166 (3) of the Constitution. He appoints a Minister albeit on the advice of the Chief Minister and the Minister holds office during his pleasure. Therefore, it is open to the Governor under the Constitution to dismiss an individual Minister at his pleasure. In these circumstances there can be no doubt that a Minister is to be considered as an officer subordinate to the Governor. It is true that Ministers' salaries and allowance are fixed by the Legislature under Article 164 (5) and further that under Article 164 (2) the Council of Ministers is collectively responsible to the Legislative Assembly.

But these circumstances do not make and cannot make a Minister anything but subordinate to the Governor who has the power of appointing and dismissing him. This view was taken by the Privy Council in Emperor Vs. Sibnath Banerji, *AIR*, 1945, P.C. 156 (A), under the Government of India Act 1935 and as the language of the 1935 Act has been reproduced in our Constitution, it must be taken that the Constitution makers accepted the correctness of this decision and adopted it. There is no material

*difference between the provisions of the 1935 Act and the Constitu*tion of India in this respect."[2] Here it may also be mentioned that the word "Minister" includes the Chief Minister[3], "Minister of States" and "Deputy Minister"[4] as well.

Hence, the Governor may exercise his executive powers either directly or through the officers subordinate to him, that is through the Ministers. It will not be out of place to mention here that Clause (4) of Article 144 of the Draft Constitution, provided for the instrument of instructions to the Governors of States. Part-I of the first schedule was included in fourth schedule and paragraph 3 of this schedule provided that "in all matters within the scope of the executive power of the State, save in relation to functions which he is required by or under this Constitution to exercise in his discretion, the Governor shall, in the exercise of powers conferred upon him, be guided by the advice of his Ministers." But later on this instrument of instructions was dropped and while moving for its deletion T.T. Krishnamachari said that "the Fourth Schedule was necessary because the certain provisions we put in the Constitution in order to describe the relations of the President and the Governors vis-a-vis the Ministers. It has now been felt that the matter should be left entirely to the Convention rather than to put in the body of the Constitution as a Schedule in the shape of instrument of instructions and there is a fairly large volume of opinion which favours that idea. Therefore, we have decided to drop Schedule 3 (B) which we have proposed as an amendment and also Schedule IV which finds a place in the Draft Constitution because it is felt to be entirely unnecessary and superfluous to give such directions in the Constitution which really should arise out of conventions that grow from time to time and the President and the Governors in their respective spheres will be guided by those Conventions."[5]

While speaking in favour of deletion of the instrument of instructions, Dr B.R. Ambedkar said that "with regard to the instrument of instructions, there are two points which have to be born in mind. The purpose of instrument of instructions as ordinarily devised in the British Constitution for the Government of Colonies was to give certain directions to the head of the States as to how they should exercise their discretionary powers that were vested in them. Now the instrument of instructions were effective in so far as the particular Governor or Viceroy to whom

these instructions were given was subject to the authority of the Secretary of State. If in any particular matter which was of serious character, the Governor, for instance, persistently refused to carry out the instrument of instructions issued to him, it was open to the Secretary of State to remove him and appoint another and thereby secure the effective carrying out of the instrument of instructions. So far as our Constitution is concerned there is no functionary created by it who can see that the instrument of instructions is carried out faithfully by the Governor.

"Secondly the discretion which we are going to leave with the Governor under this Constitution is very meagre. He has hardly any discretion at all. He has to act on the advice of the Prime Minister in the matter of selection of members of the Cabinet. He has also to act on the advice of the Prime Minister and his Ministers of State with respect to any particular executive or legislative action that he takes. It is, therefore, felt having regard to the fact that there is no discretion in the Governor and there is no functionary under the Constitution who can enforce this, that no directions should be given. They are useless and can serve no particular purpose."[6]

Hence, after the deletion of instrument of instructions if we read Clause (1) of article 154, it gives the impression as if the Governor has a discretion whether to exercise his executive powers directly or through the Ministers but in fact, it is not so because Clause (2) of article 154 clearly says that "nothing in this (article) shall prevent Parliament or the Legislature of State from conferring by law functions on any authority subordinate to the Governor." If the Governor decides to exercise some of his executive powers directly then under this sub-clause (2) of article 154, the Legislature may deprive the Governor of his executive functions and may confer them on any authority subordinate to the Governor. It may, however, be mentioned here that only those executive functions may be conferred on authority subordinate to the Governor about which the State Legislature has the power of making laws.

MATTERS IN WHICH ADVICE IS NOT BINDING

But the functions which have been specially assigned to the Governor by some of the articles of the Constitution cannot be conferred by the State Legislature or authority subordinate to him

because they are his special constitutional powers and the Governor can exercise his discretion or individual judgement about them. These constitutional powers cannot be delegated to andbody[7] else and articles 163 (1) and 166 (3) clearly say so.

It means besides the executive powers, the Governor exercises certain constitutional powers which are of three types : In the first instance, there are powers which are to be exercised by the Governor in consultation with persons and agencies other than the Council of Ministers.

Secondly, there are some constitutional powers which are to be exercised by the Governor in his discretion. These discretionary powers are of two types—that is the discretionary powers which have been explicitly, expressly and specially given to him and the general discretionary powers. The social discretionary powers have been given to him by articles 239[8] (2), 356, 371 (2)[9] 371[10] A (1) (b), (c), (e) (2) (d), and (f)[11], of the Constitution as a special provision providing for his special responsibilities. Similarly under para 9 (2)[12] and paras 18[13] (2) and (3) of the Sixth Schedule the Governor has been given special discretionary powers.

Besides these special discretionary powers there are general discretionary powers which are quite implicit, and there is already a judicial pronouncement about them. For instance in appointing[14] and dismissing[15] the Chief Minister, dismissing other Ministers[16], dissolving the Legislative Assembly[17], giving assent to Bills,[18] returning Bills for the consideration of the President,[19] issuing of Ordinances,[20] nominating members to the Legislative Councils,[21] the Governor has a discretionary power in the sense that he may either exercise his individual judgement or may exercise them with the recommendation of the Council of Ministers. Even under article 310 of the Constitution the Governor exercises his constitutional powers and "in State of Uttar Pradesh Vs. Babu Ram Upadhya, *AIR*, 1961, SC 751 in regard to powers of the Governor under article 310 to terminate the services of a Government servant at pleasure, it was held that such power of the Governor is outside the scope of article 154 which speaks of the executive power of the State vesting in the Governor."[22] Even in summoning and proroguing[23] the Assembly, the Governor may not accept the advice of the Chief Minister and there are instances where the Governors have forced the Chief Ministers to face the Assembly by a particular date.[24] These are the discretionary powers

(to enumerate some of them) and in these matters the Governor exercises his special constitutional functions. But the Governor is not bound to exercise his discretion in these matters and if he exercises these powers on the advice of the Council of Ministers, it will be neither improper nor unconstitutional. In fact, in the Calcutta High Court it was contended that in those matters where the Governor is required to perform his special constitutional functions, he must exercise his discretion. But the Court held that this expression "in his discretion" and another expression "in his individual judgement" are expressions which were freely used in the Government of India Act, 1935... unless a particular article expressly so provides, an obligation to act in his discretion cannot be imposed upon the Governor by mere implication."[25] In fact, ordinarily most of the abovementioned powers are being exercised by the Governors on the advice of the Council of Ministers but if the Governor decides to exercise his discretion or individual judgement in these matters, then there is nothing in the Constitution which prevents him from doing so. However, these powers cannot be delegated by the Governor to the Council of Ministers because "any act which is to be performed by the Governor in his discretion by or under the Constitution has to be performed by him alone."[26]

This shows that the Governor has many discretionary powers and it is very difficult to agree with Dr Ambedkar that the Governor has hardly any discretion. He, in fact, has a vast discretion and Clause (2) of article 163 supports this contention which says that "if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution is required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of any thing done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion." In fact Dr H.N. Kunzru wanted that the Governor should not have any discretion and hence he moved a resolution in the Constituent Assembly that the expression "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion" in article 143(1) of the Draft Constitution should be deleted.[27] Speaking on this point Dr Ambedkar defended the discretionary powers of the Governor and said that "the crucial question is, should the Governor have discretionary

power?... The first thing, therefore, that I propose to do is to devote myself to this question which as I said is the crucial question. It has been said in the course of debate that the retention of discretionary powers in the Governor is contrary to responsible Government in the Provinces. It has also been said that the retention of discretionary powers in the Governor smells of the Government of India Act 1935 which in the main was undemocratic. Now speaking for myself, I have no doubt in my mind that the retention in or the vesting the Governor with certain discretionary powers is in no sense contrary to or in no sense a negation of responsible Government. I do not wish to rake up the point because on this point I can very well satisfy the House by reference to the provisions in the Constitution of Canada and the Constitution of Australia. I do not think anybody in this House would dispute that the Canadian system of Government is not fully responsible system of Government nor anybody in this House will challenge that the Australian Government is not responsible form of Government."[28] Similarly, Alladi Krishnaswami Ayyar said that article 143 goes on to provide "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." So long as there are articles in the Constitution which enable the Governor to act in his discretion and in certain circumstances, it may be, to override the Cabinet or to refer to the President, this article as it is framed is perfectly in order."[29] This shows that the Governor has a discretionary power in the absence of any specific provision in the Constitution, the Governor is not bound to accept the advice of the Council of Ministers. It may, however, be said that if the Governor rejects the advice of the Council of Ministers then it will be a violation of the spirit of the Constitution. About the spirit of the Constitution, the Supreme Court has held that "it is convenient now to examine the point made by Dr Ambedkar that obligation to pay compensation is implicit in the spirit of the Constitution. It is well settled that recourse cannot be had to the spirit of the Constitution when its provisions are explicit in respect of a certain right or matter. When the fundamental law has not limited either in terms or by necessary implication the general powers conferred on the Legislatures it is not possible to deduce a limitation from something supposed to be inherent in the spirit of the Constitution. The elusive spirit is no guide in this matter.

The spirit of the Constitution cannot prevail as against its letter."[30] It seems to be very strange that about some articles of the Constitution, the members of the Drafting Committee wanted to be very specific but some of the most important articles of the Constitution were left vague. For instance, while discussing the question of the official residence of the Governor, H.V. Kamath said that "I wonder why our Constitution should be cumbered with minute details such as this (Residence of the Governor). This matter about the official residence of the Governor, is in my estimation, not even a tremendous trifle. Our Constitution would not be less sound if we omitted therein any reference to or mention of the Governors' official residence. Certainly it stands to reason that the Governor will have a residence. We do not contemplate that the Governor will be without an official residence. Do not you visualise the Premier in the Province having a residence? But have we made a mention of such a thing in the Constitution. I do not know whether this was bodily lifted from some of the unimportant Constitutions of the world, because I am sure the American Constitution makes no mention of the official residence of the President or State Governors. I do not know which Constitution has given the inspiration to Dr Ambedkar and his colleagues of the Drafting Committee."[31] But to this Dr Ambedkar replied that he would like to ask Mr Kamath whether Governor and the President should have an official residence or not and "is there very much of a wrong if the proposition was stated very much in the Constitution."[32]

Similarly when Clause (1) of Article 53 of the Constitution which provides that "the Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through the officers subordinate to him in accordance with this Constitution", was being discussed in the Constituent Assembly, some of the members said that the phrase "through the officers subordinate to him" is not needed because by implication the President will have to exercise these powers through officers. Then Alladi Krishnaswami Ayyar said that "in making quite clear what is implicit, there is nothing wrong."[33] This shows that sometimes the members of the Drafting Committee were very particular in making quite clear what is implicit but strangely enough the framers of the Constitution were not prepared to make it clear that the advice of the Council of Ministers will be binding on the

Governor and they preferred that the conventions should grow in this respect.

Sometimes it is said that even in England there is a convention that the queen accepts the advice of the Council of Ministers, hence in India too this convention should grow. In reply to this it may be pointed out that in the first instance India is not England because in India the level of constitutional morality is not as high as it is in England. Dr Ambedkar accepted this fact when he said that the people in India lack constitutional morality and democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic[34] and, therefore, he was not prepared even to trust the Legislatures.[35] When such are the conditions in India, then in the absence of the explicit provision in this respect, how can it be presumed that the advice of the Council of Ministers is binding on the Governor and that too in all respects?[36]

Secondly, some of the conventions of the British Constitution have been mentioned in the Constitution itself. For instance, according to Dr K.M. Munshi, "Articles 75(3), 75(5), 77 and 78 in express terms specify what are the Conventions in UK. Articles 109(2) and 110 embody the corresponding provisions of the law in England regarding Money Bills. Where required as in Article 105(2) express provision is made that the powers, privileges and immunities enjoyed by British Parliament and of the members and committees of the House of Commons should apply to each House of Parliament and the members and committees of each House, till appropriately defined."[37] When these conventions have been mentioned in the Constitution why has it not been mentioned in the Constitution that the advice of the Council of Ministers will be binding on the Governor?

Thirdly, even in practice the conventions of the British Constitution are not being observed by the Governor. For instance, in England the advice of the Council of Ministers about the summoning, proroguing and dissolution of the House of Commons is binding on the Queen but it is not so in India. The Governor can compel the Chief Minister either to summon the Assembly by a particular date or face a dismissal, as was done by Dharam Vira in West Bengal. He can also refuse to prorogue and dissolve the House on the recommendation of the Chief Minister. The Governor may even skip over the passages of the Governors address in spite of the advice of the Chief Minister to the contrary.[38] The

Governor has refused to dismiss the Ministers on the recommendation of the Chief Minister and has dismissed the Chief Minister just two days before the session to the Assembly, when the Chief Minister was prepared to face the Assembly almost immediately.[39] This shows that in practice the conventions of the British Constitution are not being observed. Hence, the advice is not binding in the matters mentioned above.

Besides it, some times the advice tendered by the Council of Ministers may be such which the Governor cannot follow because it may lead to the violation of the Constitution. For instance, in West Bengal, the former Chief Minister and the former Deputy Chief Minister advised the Governor not to address the first session of the State Legislature after mid-term poll.[40] But according to Calcutta High Court, the reading of the address at the annual opening session of the Legislature is a constitutional duty of the Governor which is mandatory[41] and unless he addresses it, Legislature in India cannot lawfully meet.[42] "This is also the view of the Orissa High Court expressed in Sardhakar Vs. Speaker of the Orissa Legislative Assembly, *AIR*, 1952, Orissa 234. If the Legislature has not met that is to say legally assembled for the purpose of transacting business, no business can be transacted and the sittings of the Legislature before it has legally met are invalid sittings."[43] Similarly, there may be certain parts in the address of the Governor prepared by the Council of Ministers which the Governor may not read in spite of the advice of the Council of Ministers. This shows that the advice is not binding in all the matters.

But this is the position in theory. In practice, how far the Governor can exercise his discretion or individual judgement in the matters mentioned above will depend upon the composition of the Legislative Assembly. If one of the parties has a clear cut majority in the Assembly and has a clearly recognised leader then some of the abovementioned powers will have to be exercised by the Governor on the advice of the Chief Minister. It may, however, be mentioned here that except those articles which expressly require the Governor to act in his discretion, it will not be unconstitutional on the part of the Governor to act upon the advice of the Council of Ministers.[44] But in case if none of the political parties have a majority and there is a shaky coalition in

office, then the Governor may be tempted to exercise his individual judgement in certain matters at least.

NOTES

1. Moti Lal Vs. UP Government, *AIR*, 1951, All., 257.
2. Tara Singh Vs. Director of Consolidation of Holding, *AIR*, 1958, Punjab, p. 304.
3. Harsharan Verma Vs Chandra Bhan Gupta, *AIR*, 1962, Allahabad, 301.
4. *ibid.*, *AIR*, 1968, Bombay, 219.
5. T. T. Krishnamachari, *CAD*, Vol. X, p. 114.
6. *CAD*, Vol X, p. 115.
7. Rao Birendra Singh Vs. Union of India, *AIR*, 1968, Punjab, 446.
8. "Notwithstanding anything contained in Part-VI, the President may appoint the Governor of a State, as the administrator of an adjoining Union Territory and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."
9. "Notwithstanding anything in this Constitution, the President may by order made with respect to the State of Maharashtra or Gujarat, provide for any special responsibility of the Governor for –
   (a) the establishment of separate development boards for Vidarbha, Maharathwada and the rest of Maharashtra or, as the case may be, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly ;
   (b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirement of the State as a whole ; and
   (c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirement of the State as a whole.
10. (a) "The Governor of Nagaland shall have special responsibility with respect to law and order in the state of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills Tuensang Area immediately before the formation of that state continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgement as to the action to be taken;
    (b) in making a recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for

any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand ;

(c) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional Council for the Tuensang district consisting of Thirty-five members and the Governor shall in his discretion make rules providing for—

(i) the composition of the regional Council and manner in which the members of the regional Council shall be chosen...

(ii) the qualifications for being chosen and for being members of the regional Council ;

(iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional Council ;

(iv) the procedure and conduct of business of the regional Council ;

(v) the appointment of officers and staff of the regional Council and their conditions of service ; and

(vi) any other matter in respect of which it is necessary to make rules for the Constitution and proper functioning of the regional Council.

11. 2(f) "Notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to Tuensang district shall be made by the Governor in his discretion;"

12. "If any dispute arises as to the share of such royalties to be made over to a district Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the district Council and the decision of the Governor shall be final."

13. 18 (2) "until a notification is issued under sub-paragraph (1) of this paragraph in respect of any Tribal area specified in part B of the said table or any part of such area, the administration of such area or part thereof as the case may be shall be carried on by the President through the Governor of Assam as his agent and the provisions of article 240 shall apply thereto as if such area or part thereof were a Union Territory specified in that article."

(3) "in the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion."

14. See the Chapter on the appointment of the Chief Minister.

15. The Calcutta High Court has already given a decision in this respect.

16. The Governor of UP, B. Gopala Reddy, did not dismiss some of the Ministers in spite of the recommendation of Charan Singh, the then Chief Minister.

17. There are many examples where the Governors have refused to dissolve the Assembly on the recommendation of the Chief Minister. See the Chapter on Dissolution for detail.

18. See the Chapter on "The Role of the Governor in Legislation", for detail,

19. Vide Second Proviso of Article 200.
20. Rao Birendra singh Vs. Union of India, *AIR*, 1968, Punjab, p. 446.
21. There are many examples where the Governor has nominated members without the advice of the Council of Ministers. C. Rajagopalachari was nominated by Sri Prakasa, the Governor of Madras without the advice of the Chief Minister. For details see the Chapter on "The Role of the Governor in Legislation."
22. Rao Birendra Singh Vs. Union of India, *AIR*, 1968, Punjab, 446.
23. *Journal of Society for Study of State Governments*, Vol. V, January-March, 1972, No. 1, pp. 68-69, For details see the Chapter on "The Power of Prorogation."
24. This was done by Dharam Vira, the Governor of West Bengal. For details see the chapter on "The Governor and his Power of Summoning Legislature." Here it may also be mentioned that the Mysore High Court has held that "the power of proroguing a session of the Legislature is exclusively that of the Governor in whom rests the power to summon the same." H. Siddaveerappa and others Vs. the State of Mysore *AIR*, 1971 Mysore, 200.
25. Biman Chandra, Vs. Dr H. C. Mukherjee, *AIR* 1952, Calcutta. 801.
26. *AIR*, 1967, Rajasthan, 220.
27. *CAD*, Vol. VIII, p. 492.
28. *CAD*, Vol. VIII, p. 500.
29. *ibid.*, p. 495.
30. State of Bihar Vs. Kameshwar Singh, *AIR*, 1952 SC, 309,
31. *CAD*, Vol. VIII, p. 476.
32. *ibid.*
33. *CAD*, Vol, X, p.357.
34. *ibid.*, Vol. VII, p. 38.
35. *CAD*, Vol. VII, p. 38.
36. Article 194 (3).
37. K. M. Munshi, "*The President Under the Indian Constitution*. Ist edn. 1963, pp. 30-31.
38. In West Bengal the Governor, Mr. Dharam Vira, refused to read some of the paragraphs prepared by the Council of Ministers. *Patriot*, March 7, 1969, p. 1.
39. In UP, the Governor, B. Gopala Reddy, refused to dismiss the Ministers on the recommendation of the Chief Minister and subsequently dismissed the Chief Minister himself. *The Hindustan Times*, October 3, 1970, p. 1.
40. *The Indian Express*, February 22, 1968, p. 6.
41. Syed Abdul Mansur Habibullah Vs. The Speaker of the West Bengal Legislative Assembly & others, *AIR*, 1966, Calcutta, 363.
42. *ibid.*
43. *ibid.*
44. Biman Chandra Vs. Dr. H.C. Mukherjee, *AIR*, 1952, Calcutta, 801.

VI

Governor and the Composition of the State Legislature

POWERS OF NOMINATION

Like the British Crown, the Governor in India is an integral part of the State Legislature which consists of the Governor and the Legislative Assembly and wherever there is a bi-cameral Legislature it consists of the Governor, the Legislative Assembly and the Legislative Council.[1] Under article 171 (3) (e) of the Constitution the Governor is to nominate one-sixth of the members of the Legislative Council. "The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge of practical experience in practical matters such as Literature, Science, Art, Cooperative Movement and Social Service."[2]

QUALIFICATIONS

If we examine the qualifications mentioned in article 171, then we will find that they are quite vague and when the Governor is to nominate more than one person it is not necessary that he should nominate persons of different categories mentioned in the article. In fact, he can nominate more than one person belonging to the same category.[3] Besides this, the question whether the persons nominated have the required qualifications or not, cannot be decided by the court because whether one possesses the required qualifications or not is a question of fact and the High Court cannot decide it under article 226.[4]

In Biman Chandra Vs. Governor, West Bengal, it was alleged that out of nine persons nominated by the Governor, none fulfils the requirements of article 171 (5). But the Court held that "the Governor alone is made the sole Judge on this point. The Court

cannot substitute its opinion or decision in place of the decision of the Governor."[5]

But it will not be out of place to mention here that the Allahabad High Court has taken a different view on this point. In Harsharan Verma Vs. Chandra Bhan Gupta it was alleged that Chandra Bhan Gupta "got himself nominated as a member of UP Legislative Council under article 171 (5) of the Constitution although he could not claim to have any special knowledge in respect of Literature, Science, Art, Cooperative Movement or Social Science." According to petitioner clause (5) applies only to those persons who do not seek elections but have special knowledge in certain subjects and whom the Governor nominates in the public interests as a member of the Legislature. But this clause cannot be availed of as a back-door for the nomination of persons who lost popular election more than once." The Court held that "even practical experience in spheres enumerated makes a person eligible for nomination to the Council even though he has no special knowledge in them--person who has taken active part in politics and the governance of the State for several years--presumption is that he has practical experience in matters of social service and is, therefore, qualified to be nominated as a member of the Council."[6] In this case the Allahabad High Court has decided whether the person nominated has the required qualifications or not.

Whenever, the Governor nominates persons under article 171 (3) (e), the Court can neither ask the Governor, nor the persons nominated, to justify the nominations. The Calcutta High Court has held that "the Governor not being answerable to Court by reason of article 361, it follows that the validity or invalidity of the nominations cannot be enquired into by this Court in the present case. The Governor not being liable to justify the nominations is not bound to disclose any facts relating to such nominations. The other respondents cannot also be properly called upon to support or justify the nominations because they may not know anything about the facts or considerations which led the Governor to make the nominations. The advice tendered by the Ministers to the Governor cannot also be enquired into by the Court by reason of the provisions of article 163(3) of the Constitution."[7]

It may, however, be asked as to whether he is to act upon the advice of the Council of Ministers while exercising his powers of

nominating the members or whether he is to exercise his discretion in this respect. On this point there are two conflicting opinions. According to C.K. Daphtary (former Attorney General) "the nomination is not made by the Governor in his discretion, but is made by the Governor in the exercise of his executive power of the State vested in him on the aid and advice of the Council of Ministers.[8] But according to the other school of thought "the power exercised by the Governor under article 171(3) (e) is not an exercise of the executive power of the State but that in acting under this provision of the Constitution, the Governor exercises his special constitutional function, mentioned therein, and this function has to be performed by the Governor himself in his discretion."[9] If we examine this question a little bit more carefully, then it will be found that it is difficult to agree with the proposition made by the former Attorney General. Just as the power of issuing ordinance is a constitutional power and not a power of the Government,[10] and hence, it is incapable of being delegated or entrusted to any other body or authority, similarly, the power of nomination is also a constitutional power given to the Governor by Chapter III of Part-VI which gives other constitutional powers to him such as the power of summoning, proroguing and dissolution. The contention that the Governor does not exercise this power in the exercise of his executive power of the State is also supported by the fact, that the executive power of the State extends only to those matters with respect to which the Legislature of the State has power to make laws[11] and since the State Legislature has no power to make laws in this respect, therefore, it is not an exercise of the executive power of the State. Hence it is a discretionary power, but if the Governor instead of exercising his discretion, acts upon the advice of the Council of Ministers, then it will not be unconstitutional. For instance, the Governor of West Bengal nominated 9 persons to the Legislative Council vide notification No. 1577 AR—4-4-195, in exercise of the power conferred on him by sub-clause (e) of clause 3 of article 171 but in his public speech he said that "he did not know that he had the power to make any nomination."[12] In that case it was contended that under article 171 for the purpose of making nominations as contemplated by clause 5 thereof, the Governor has to act in his discretion and as "it is clear from certain speeches made by the Governor that he did not know that he had the power to make any nomination, the

Governor cannot be said to have exercised his discretion in making the nomination. Mr Mullick has referred to articles 154, 161, 192 and 213 which confer certain powers upon the Governor. He has also referred to article 166 of the Constitution and submits that as it does not appear that any rules as contemplated by clause 3 thereof have been framed by the Governor, it must be held that in making nominations under article 171 the Governor does not act on the advice of his Council of Ministers but in his discretion. This view has also been upheld by the Madras High Court.[13] The Calcutta High Court, however, does not agree with this view. In Biman Chandra Vs. Dr H.C. Mukherjee it held that "it appears, however, from article 163 that except in matters the Governor is required to act in his discretion, he is to act on the advice of the Council of Ministers. It may be pointed out that article 171 does not state that in making nominations the Governor is *bound* to act in his discretion. This expression "in his discretion" and another expression "in his individual judgement" are expressions which were freely used in the Government of India Act 1935. Reference may be made to SS. 50, 51, 52 (3), 55, 56, 57, 58, 228 and various other sections of the Government of India Act 1935. Unless a particular article expressly so provides, an obligation to act in his discretion cannot be imposed upon the Governor by mere implication. There is nothing to show that no rules as contemplated by article 163 (3) (sic) have been framed by the Governor, article 163 makes it quite clear that except in cases the Governor is required to act in his discretion, he is to act on the advice of his Ministers and so it must be presumed that in making the impugned nominations, he must have acted on the advice of his Council of Ministers. The Court is entitled to presume the regularity of official acts."[14] The Patna High Court has agreed with this view.[15]

It means that while exercising this power, if the Governor acts on the advice of the Council of Ministers, it will be constitutional. But it does not mean that this power should always be or has always been exercised only on the recommendation of the Council of Ministers and there are many examples where this power has been exercised without such advice. For instance, after the elections in 1952, were over, the Governor of Madras nominated four persons including C. Rajagopalachari, to the Legislative Council by exercising his discretion. Sri Prakasa while defending his action

said that the "convention requires that the Governor should make such nomination on the advice of the Chief Ministers. As the then Chief Minister was not prepared to give any advice on any thing, I had to act on my own."[16] Subsequently these nominations were challenged in the Madras High Court by Ramamoorthi on the ground that it was "virtually in exercise of fraud of the powers conferred by the Constitution on the Governor because the nomination was made with the ulterior object of assisting the Congress Legislature Party."...The validity of nomination (was) also challenged on the ground that "the Governor cannot exercise the power of making the nominations under article 171 (3) (e), (5) of the Constitution except on the advice of the Council of Ministers." But the High Court refused to accept these contentions.[17]

There are other examples also where the Governors have exercised this power without the advice of the Council of Ministers. For instance, "after the general elections in 1957, the Kerala Governor nominated an Anglo Indian to the State Assembly. The nomination was made even before the new Government was formed and, therefore, without its advice."[18] Similarly, the Governor of UP, B. Gopala Reddy nominated four Congress backed persons to the Legislative Council during the President's Rule.[19] This shows that the Governor though has a discretion in this respect and in case if he decides to exercise his individual judgement, it will be constitutionally valid. But ordinarily it is expected that he would act upon the advice of the Council of Ministers in this respect but while doing so he may ignore the advice of the out-going Chief Minister. For instance, in Bihar the out-going Chief Minister, Mahamaya Prasad Sinha "recommended to the Governor not to nominate B.P. Mandal to the Council as the latter did not have any qualifications that were laid down under article 171 of the Constitution," but the Governor ignored that advice.[20] In case, if the Chief Minister recommends his own name for nomination, what should the Governor do ? For instance, the leaders of the various constituents of the SVD in UP advised T.N. Singh "the Chief Minister to get himself nominated in the Legislative Council as they felt that the selection of a new leader...would precipitate the dissolution of the State Assembly."[21] When the opposition leader and Uttar Pradesh Congress (N) chief, Kamlapati Tripathi, came to know about this move, he wrote a letter to B. Gopala Reddy, the Governor,

requesting him not to do so because "it would not be in accordance with the established democratic traditions to nominate Chief Minister T.N. Singh to the State Legislative Council on his own recommendation."[22] It seems it is highly improper if the Chief Minister does so, but from the constitutional point of view it will not be unconstitutional and there are examples where the Chief Ministers have done so. For instance, in 1961, C.B. Gupta who was appointed as a Chief Minister on December 7, 1960, got himself nominated as a member of the Legislative Council on January 23, 1961.[23] It will not be out of place to mention here that C.B. Gupta "contested the election to the Legislative Assembly twice—once from the Lucknow city constituency in 1957 and again from Maudaha (Hamirpur) rural constituency in 1958, but was defeated in each election."[24]

In fact, it is expected that the leaders who are defeated at the poll should not ordinarily be nominated because that is not the purpose of this article and the Allahabad High Court has held that "the purpose of these two clauses is not difficult to ascertain. In every State there are persons who have achieved distinction in various fields and the benefit of whose experience and advice may be invaluable to the Legislature of the State, but who have neither the time nor the inclination to contest elections and who should not, in the public interest fritter away their energies in fighting political elections. For example, the President may nominate an eminent nuclear scientist as a member to enable the Legislature to benefit by his views before passing any laws regulating the production of nuclear energy. Numerous other illustrations could be given of persons who have special knowledge or practical experience of literature, science, art and social sciences. Clause (5) of article 171 was apparently intended to make the membership of the Legislature available in the public interest to such persons so that they may not contest elections. It was not enacted to enable a minister who has been defeated in an election to enter the Legislature by the back door of nomination, or to enable the political party in office whose strength is derived from the verdict of the electorate, to increase its numerical strength in the Legislature without submitting to this verdict."[25]

But the Court further held that if the party in power does so and if the Governor is prepared to oblige, then it will be improper but not illegal and the Court cannot interfere.[26]

Besides nominating members to the Legislative Council "notwithstanding anything in article 170, the Governor of a State may, if he is of the opinion that the Anglo Indian Community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate such number of members of the Community to the Assembly as he considers appropriate."[27]

TIME OF NOMINATION

About the powers of the Governor to nominate person to the Legislative Council, it may also be asked as to whether he should nominate them after the election to the various categories of persons mentioned in clauses (a) to (d) of clause (3) of article 171 has been held or can he nominate them before the election of the abovementioned category of persons? This question was raised in Biman Chandra Vs. Dr H.C. Mukherjee, Governor of West Bengal in Calcutta High Court by Mr Mullick when he said that "the Governor has no power under article 171 to make the nominations until the elections are over and reference has been made to various clauses (a) to (e) of clause 3 of article 171 for showing that the scheme of the article is that it is only after the persons contemplated in clauses (a) to (d) are elected that the Governor should make the nominations and adjust his nominations in accordance with the elections of persons in the different categories specified in clauses (a) to (d). It is suggested that if too many or very few persons representing literature or science have been elected in respect of the electorates mentioned in clauses (a) to (d), the Governor should reduce or increase his nominations in respect of those categories accordingly."[28] Justice Bose, however, held that "it appears to me, however, upon a plain reading of the Article that there is no indication to be found therein, which has the effect of postponing this act of nomination until after the election is over. It is well settled rule of interpretation that the provisions of the Constitution should not be construed in a narrow or pedantic sense. As there is no warrant for putting a restriction on the power of the Governor, I do not propose to put any such construction on the article in question."[29]

DISQUALIFICATIONS OF MEMBERS

Before taking their seats in the State Legislature the members are required to take an oath before the Governor, or some person

appointed in that behalf by him according to the form set out for the purpose in the Third Schedule.[30] After taking an oath "if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final."[31] But under article 192 (2) before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.[32] The intention of the framers of the Constitution in providing clause (2) of the article 192 was that the Governor should not be given unrestricted powers in this respect which may be misused by him on certain occasions. T.T. Krishnamachari, while speaking on article 167 (A) of the Draft Constitution, (which is the present article 192) said that "in order to prevent the Governor from acting himself or even acting on the advice of his Ministers from motives which might not be proper, the second clause lays the responsibility on the Governor and his advisers to obtain the opinion of the Election Commissioner or whoever decides the matter on behalf of the Election Commissioner."[33]

It may, however, be asked as to how far article 192 (2) provides a guarantee against the misuse of this power by the Governor? Here it may be stated that the phrase "his decision shall be final" in article 192 (1) should not create fear in this respect because clause (1) of article 192 is controlled by clause (2) of the same article and it is the decision of the Governor given according to the opinion of the Election Commission which is final and not a decision given otherwise. In case, if he has given a decision otherwise, the validity of his decision can be questioned in the court of law when he acts "otherwise than according to the opinion of the Election Commission, for 'finality' can attach only to *intra vires* exercise of the power, when a power is limited by conditions."[34] The word "shall" in clause (2) of the present article also indicates that the Governor's obligation to act according to the opinion of the Election Commission is absolute. The Supreme Court in Brundkhan Vs. Election Commission of India, *AIR*, 1965 Sc 1892 has stated at page 1896 that "the question of the type contemplated by article 192 (1) shall be decided by the Governor and the Governor alone. The Supreme Court held in para 16 of the report that the opinion of the Election Commission

under article 192 (2) is in substance decisive...This view of the Supreme Court was derived from the terms of article 192 (2) of the Constitution that the Governor "shall act according to such opinion."[35]

But the Election Commission before giving its opinion to the Governor must give a chance to the member to explain his case. After the opportunity has been given to the member by the Election Commission and when the Governor has given a decision according to its recommendation, the decision shall be final and it cannot be challenged in any Court of Law.[36]

But if we read the clauses (1) and (2) of article 192 a little bit more carefully then we will find that there is a contradiction between them which cannot be easily reconciled. For instance, in clause (1) it is said that the decision of the Governor is final, whereas clause (2) says that he shall have to act according to the opinion of the Election Commission. This contradiction was pointed out in the Constituent Assembly by Kazi Syed Karimuddin. While speaking on clause (2) of article 167 (A) of the Draft Constitution which is article 192 of the present Constitution he said that "it is said in clause (2) that before giving any decision on any such question the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion. According to this sub-clause (2), the Governor becomes only the post office, because when once it is said that the opinion of the Governor shall be final and in the same breath it is stated that he will be bound by the opinion of the Election Commissioner, then why not to accept the decision of the Election Commission and say its decision shall be final and it will be pronounced by the Election Commissioner."[37]

But Dr Ambedkar, the Chairman of the Drafting Committee held different views on this point. He, for example, said that "the reason why the decision is left with the Governor is because the general rule is that the determination of disqualification involving vacancy of a seat is left with that particular authority which has got the power to call upon the constituency to elect representative to fill that seat...There is no doubt about it that in the new Constitution it is the Governor who has been given the power to call upon a constituency to choose a representative. That being so, the power to declare a seat vacant by reason of disqualifications must as a consequence rest with the Governor."[38]

While defending clause (2) of article 167 of the Draft Constitution, Dr Ambedkar further said that "if members will turn to Article 167, they will find that, so far as the qualifications mentioned in (a) to (d) are concerned, the Commission is not really in a position to advise the Governor at all, because they are matters outside the purview of the Election Commission. For instance, whether any particular person holds an office of profit or whether a person is of unsound mind and has been declared by a competent court to be so, or whether he is an undischarged insolvent or whether he is under any acknowledgement or adherence to a foreign power are matters which are entirely outside the purview of the Election Commission. They, therefore, could not be the proper body to advise the Governor. But when you come to sub-clause (e) I think it is a matter which is within the purview of the Election Commission, because under (e) disqualifications might arise by reason of any corruption or unprofessional practice that a candidate may have engaged himself in and which may have been made a matter of disqualification by Election Law."[39]

But this statement of Dr Ambedkar does not seem to be very convincing because, whereas, on the one side he says that "the Election Commission is certainly not in a position to advise the Governor about the disqualifications mentioned in clauses (a) to (d) of article 192", on the other hand, in its present form, the Governor must consult the Election Commission, under article 193, about all the disqualifications mentioned in clause (a) to (e) of article 192 and act accordingly. It, however, becomes clear from this statement that Dr Ambedkar wanted the Election Commission to be consulted only when a disqualification arises under clause (e) of article 192 and, in fact, he moved an amendment also in this respect. The amendment was that "before giving any decision under sub-clause (e) of clause (1) of the last preceding article, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."[40] But in the final draft of the Constitution, this amendment was dropped and the article was passed in its present form.[41] Here it should, however, be noted that the scope of this article is restricted to post-election disqualifications and the question whether a member was disqualified at the time of election cannot be referred to the Governor.

ADMINISTRATION OF OATH

Besides this under article 188 of the Constitution, every member of the Legislative Assembly or the Legislative Council has to take an oath before the Governor or some person appointed in that behalf in the form set out for the purpose in the third schedule. Since it is a constitutional duty of the Governor, hence, he cannot refuse to perform it because it is a mandatory provision of the Constitution. Just as under article 176 "the Governor cannot decline to deliver a speech and thus refuse to perform a constitutional duty"[42] similarly, under article 188 of the Constitution, the Governor cannot refuse to perform this duty as well. If the Governor appoints the Speaker or the Deputy Speaker to perform this duty, even they cannot refuse to administer the oath of office to a member. The point whether the Governor can depute somebody else to administer the oath to the newly elected members of the Assembly or not, was raised in the Rajasthan Assembly. "The Jana Sangh spokesman Satish Chandra Agarwal said that the Governor was not constitutionally authorised to make such arrangement. After much legal hair splitting over the question whether the present meeting of the Legislature was a formal sitting or not, the provisional Speaker Poonam Chand Bishnoi set aside the objections on the ground that the Governor was duly authorised to depute the provisional Speaker."[43]

When the Speaker administers the oath on behalf of the Governor, he cannot claim the immunity under article 212 (2) of the Constitution. In case if he refuses to administer an oath as the Speaker of the Travancore Cochin did in the case of Thankamma, then the court can intervene. In that case it was argued that the administration of an oath is a matter which "related to the conduct of business and as such the Courts have no jurisdiction. Articles 188 and 189 are given under the heading 'conduct of business'. But the Court did not accept this contention and held : What Article 188 provided for was that the members before taking their seat should make or subscribe an oath or affirmation before His Highness the Raj Pramukh or some person appointed by him in that behalf. The taking of oath is, therefore, not an item in the conduct of business mentioned in Article 212 but it allows the members to sit in the Assembly. So it is only a condition precedent to enable the members to sit in the Assembly, and conduct the business."[44]

Hence, the Speaker was directed to administer the oath.[45]

NOTES

1. Article 168
2. Article 171 (5).
3. Vidya Sagar Vs. Krishna Ballabha Sahay, *AIR*, 1965, Patna, 321.
4. *ibid.*
5. Biman Chandra Vs. Dr A. C. Mukherjee, *AIR*, 1952, Calcutta, p. 802.
6. Harsharan Varma Vs. Chandra Bhan Gupta, *AIR*, 1962, All., 301.
7. Biman Chandra Vs. Dr H. C. Mukherjee, Governor, West Bengal, *AIR*, 1952, Calcutta, 803.
8. Vidya Sagar Vs. Krishna Ballabha Sahay, *AIR*, 1965, Patna, 321.
9. *ibid.*
10. Desu Rayudu Vs. A. P. Public Service Commission. *AIR*, 1967, Andhra Pradesh, 362.
11. Article 162.
12. Biman Chandra Vs. Dr H.C. Mukherjee, Governor West Bengal, *AIR*, 1952, Calcutta 801,
13. In re Ramamoorthi, *AIR*, 1953, Madras, 95.
14. Biman Chandra Vs. Dr H. C. Mukherjee, *AIR*, 1952, Calcutta, p. 801.
15. Vidya Sagar Vs. Krishna Ballabha Sahay, *AIR*, 1965, Patna, 321.
16. *State Governors in India*, Sri Prakasa, 1966, p. 42.
17. In re Ramamoorthi *AIR*, 1953, Madras, p. 95.
18. *Tribune*, Ambala Cantt. March 10, 1967.
19. *Rajya Sabha Debates* Vol 65, No. 18, August 19, 1968, Col. 3561.
20. *Tribune*, January 29, 1968, p. 1.
21. *Hindustan Times*, March 22, 1971, p. 11
22. *ibid.*
23. Harsharan Varma Vs. Chandra Bhan Gupta, *AIR*, 1962, All., 301.
24. *ibid.*
25. *ibid.*
26. *ibid.*
27. Article 333. Under this article the Governor nominates one Anglo Indian in Bihar and UP and four in West Bengal Assembly. *The Indian Express*, January 5, 1961, p. 1
28. Biman Chandra Vs. Dr H. C. Mukherjee, Governor of West Bengal, *AIR*, 1952, Col. 802.
29. *ibid.*
30. Article 188.
31. Article 192 (1).
32. In Punjab, the Governor disqualified Hazara Singh Gill from the membership of Vidhan Sabha by reason of his conviction for an offence and sentence of two years imprisonment standing against him...The question whether Gill has become disqualified from being a member of Vidhan Sabha was

referred by the Speaker of the Assembly to the Governor who in turn asked for the opinion of the Election Commission of India under clause (2) of article 192 of the Constitution. The order of the Governor was in accordance with the opinion of the Election Commission. *Tribune*, November 1, 1963. Similary, the Governor of Orissa Dr. A. N. Khosla, issued an order of the recommendation of Election Commission that Mr Nayak, Minister of Community Development is disqualified to be a member of the State Assembly on the ground that he had a "subsisting business contract with State Government," *The National Diary*; June 16-30. 1965, p. 599.

33. *CAD*, Vol. VIII, p. 862.
34. D. D. Basu, *Commentary on the Constitution of India*, 5th ed., Vol II, pp, 577-78.
35. R. Srivasankar Vs. Election Commission of India, *AIR*, 1968, Madras 235.
36. The Madras High Court has held that "the jurisdiction to decide the question of disqualification under article 191 (1) of the Constitution vests exclusively in the Governor and no court has got jurisdiction to go into it, whether in writ proceedings or otherwise. Next, a sitting member gets the opportunity to put forward his objection to the alleged disqualification at an enquiry which is to be held by the Election Commission before the latter forwards its opinion under Article 192 (2) to the Governor when such an opportunity has been afforded by the Election Commission and the Election Commission has come to a decision on the disqualification and conveyed his opinion about it to the Governor and the Governor has acted upon that opinion and disqualified the member, there can be no more occasion for the court to question the decision, either on account of its merits or on account of the member not having been given proper opportunity to show cause, if infact, the Election Commission has given the necessary opportunity. *AIR*, 1965, SC 961 and *AIR*, 1965, Sc. 1892 Foll." P. Srivasankara Vs. Election Commission of India, *AIR*. 1968, Madras 235.
37. *CAD*, Vol. VIII, p. 862.
38. *ibid.*, p. 866.
39. *ibid.*
40. *ibid.*
41. The Constitution (thirty-second Amendment) Bill 1973 provides to add a further proviso to articles 103 and 192 under which the President and the Governor respectively would further decide the question of disqualification incurred on account of defection by the members of Parliament and the State Legislature. But the defector would not automatically invite the legal penalty. They would take cognizance of floor crossing only if members of the party complain about it. *Tribune*, June 22, 1973 p. 4.
42. Syed Abdul Vs. West Bengal Legislative Assembly *AIR*, 1966, Calcutta, 370.
43. *Statesman.*, May 4, 1967, p. 1.
44. Thankamma Vs. Speaker, T. C. Assembly, *AIR*, 1952, Travancore-Cochin, 169,
45. *ibid.*

VII

Powers of Summoning the State Legislature

According to article 174 (1) : "The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session."[1] But does it mean that in no case, the gap between the last sitting in one session and the date fixed for its first sitting in the next session, can be more than six months? It is not so because some times it may not be possible to summon the Legislative Assembly within a period of six months because it might have been suspended or dissolved by the President under article 356 or subsequent to dissolution under article 174 (2) (b), President's rule might have been imposed as it happened in Punjab in 1971.[2] It may be mentioned here that if the Legislative Assembly is dissolved under article 174 (2) (b), with a care taker or other ordinary Government in office,[3] then the Governor will have to ensure that the elections are held well in time so that the gap between the last sitting in the previous session and the date appointed for its first sitting in the next session is not more than six months. It will have to be so because in the absence of the sitting of the Assembly, the budget will not be passed and unless the budget is passed, the care taker or the other ordinary Government cannot stay in office.[4] It may, however, be asked as to how far will it be possible for the care taker Government to get the budget passed through an ordinance. This happened in Orissa in 1961 when the Governor passed the budget by an ordinance. But the Ministry of Home Affairs (Government of India) later on informed the Governor that he cannot do so. Since according to the ruling of the Home Ministry, the budget cannot be passed by an ordinance,

therefore, if the Assembly is dissolved under article 174 (2) (b), with a care taker Ministry in office, the elections will have to be held within a short time so that the Assembly may be summoned as mentioned in article 174 (1) of the Constitution and the gap between the last sitting in the previous session and the first sitting in the ensuing session may not be more than six months. It was because of this reason that the Election Commission advised the six States of Andhra, Assam, Himachal Pradesh, Jammu and Kashmir, Maharashtra, Rajasthan and the Union Territories of Goa, Daman and Diu and Delhi to convene short Assembly sessions before going to polls in March, 1972 so that six months shall not intervene between the last sitting of the dissolved Assembly and the first sitting of the next House.[5] Hence, the Himachal Pradesh Governor summoned one day session of the Assembly before it was dissolved under Article 174 (2) (b).[5]

It may also be asked in this connection as to whether both the Houses of the State Legislature (wherever there is a Legislative Council) are to be summoned simultaneously or separately? It appears as if the Governor has a discretion in this respect because article 174 (1) of the Constitution empowers him to summon each House of the Legislature of the State from "time to time" and under article 175 (1) of the Constitution the Governor may address "either House of the Legislature of the State or both Houses assembled together and may for that purpose require the attendance of the members." Moreover, the explanatory note given in article 213 (2) clearly says that both the Houses can be summoned on different dates.[7] But in spite of these articles this is not a fact because article 176 (1) makes it mandatory on the part of the Governor to address both the Houses assembled together (if there is a Legislative Council) at the commencement of "the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year."[8] It means that at least the first session after the elections and the first session each year, will have to be summoned simultaneously because only then the Governor will be in a position to address both the Houses assembled together. But what about the sessions other than those mentioned above? Since according to the decision of Calcutta,[9] Orissa[10], and Mysore[11] High Courts, the session cannot commence without the address of the Governor, hence, it seems, that the Governor has no alternative but to

summon both the Houses of the State Legislature (where ever there is a Legislative Council) simultaneously because there is no provision in the Constitution for a separate Governor's address to each House of the State Legislature.

SUMMONING ON THE ADVICE OF THE CHIEF MINISTER

Ordinarily it is expected that the Governor shall summon the Assembly on the advice of the Chief Minister but what should the Governor do when there are large scale defections from the party in power as was the case in West Bengal,[12] Bihar,[13] Haryana,[14] Punjab,[15] Madhya Pradesh,[16] and UP.[17] or when the coalition Ministry breaks because of the internal dissensions? This may happen when one of the coalition partners either withdraws from the Cabinet, as was done in Punjab by the Jana Sangh[18] and in Orissa by the Jana Congress in January 1971, by the Utkal Congress in June 1972,[19] or when one of the major coalition partner withdraws the support without withdrawing from the Ministry as was done by the Congress (R) in UP when Charan Singh was the Chief Minister.[20] What should the Governor do in that case? Should he:—

(a) ask the Chief Minister to summon the State Legislature immediately in order to prove that he still has a majority in the Assembly;

(b) ignore such defections for the time being;

(c) ask the Chief Minister to resign;

(d) prorogue the House if it is in session to enable the Chief Minister to consolidate his position;

(e) dissolve the House under article 174 (2)(b) or get the House dissolved under article 356, to enable the Chief Minister to seek the fresh mandate of the people.

The first course of action was adopted by Dharam Vira in 1967 in West Bengal,[21] by D.C. Pavate in 1970 in Punjab,[22] and by Shriman Narayan in April 1971 in Gujarat.[23] The second course of action was followed by Justice Mehar Singh, the acting Governor in August 1967[24] and by B.N. Chakravarty in November, 1967[25] and then in December 1968[26] in Haryana, by M. Ananthasayanam Ayyengar in September 1967,[27] Nityanand Kanungo in October 1970[28] and by D.K. Borooah in July 1971[29] in Bihar.

B. Gopala Reddy in UP followed the second course of action in October, 1969 when C.B. Gupta was the Chief Minister[30] but followed a third course of action in October 1970 when Charan Singh was the Chief Minister.[31] K.C. Reddy in July 1967 in Madhya Pradesh[32] and Bhagwan Sahay in March, 1970[33] in Jammu and Kashmir followed the fourth course of action, that is they prorogued the Assemblies. D.C. Pavate in June, 1971, in Punjab[34] and B.D. Jatti in March 1973 in Orissa[35] followed the last course of action. This shows that whenever, there were defections from the ruling party or the ruling coalition, the Governors in the States and sometimes, the same Governor in the same State[36] took different stands. Whereas in West Bengal the Governor was very much particular about the exact date before which the Assembly must meet, the Governor of Punjab was not prepared to make it an issue of prestige.

Whether the Governor should take note of the defections or not, on this point the Law Ministry is of the view that

> "(a) the Governor has no power to summon the State Legislature against the wishes of the Chief Minister to ascertain whether the present Government still enjoyed necessary support;
>
> (b) the relative strength of the Government in the Legislature can be tested only on the floor of the House through a relevant vote: and (c) the Governor cannot take any cognizance of any changes in party or personal loyalties on the basis of public parade of its strength by the opposition."[37]

Shri K. Santhanam, agrees with this opinion when he says that "it is entirely wrong to think that it is the duty of the Governor to take note of an inerease or decrease in party strength from day to day. Once he has formed the Ministry, it is for the State Assembly to decide whether or not it should continue in office. Neither law nor convention prohibits a Cabinet having only minority support from conducting the Government so long as the Assembly does not record its disapproval by a no confidence motion or rejection of the budget."[38] But the Home Ministry does not agree with this view. Y.B. Chavan, the former Home Minister said in the Lok Sabha that "as the constitutional head of the State it was the duty of the Governor to watch always that the Chief Executive, namely the Chief Minister, enjoyed the

support of the majority of the House. If there was any doubt about it, he had to take cognizance of it."[39]

While defending this point of view, after the dismissal of Ajoy Mukherjee Ministry in West Bengal, Y.B. Chavan said that the Legislature and the Executive are very delicately balanced and he (the Governor) has to see that the Executive is collectively responsible to the Legislature. It is his duty to bring the Executive and the Legislature face to face with each other. This is the role of an umpire.[40] Morarji Desai even went a step further in support of this contention when he said that how can the Governor allow the Chief Minister to remain in office for more than a month and half after he has lost the confidence of the House?" The Governor would not have been fit to remain in office if he had allowed such a murder of the Constitution at the hands of the Chief Minister."[41] If this is the position then what about those Governors who ignored the defections for more than four months, for example M. Ananthasayanam Ayyengar of Bihar and B. Gopala Reddy of UP ? Is it not a fact that C.B. Gupta was allowed to stay in office for more than four months after he has lost the confidence of the House due to the Congress split?

It should also be noted in this connection that whenever the Governor does not take any note of such defections, the opposition becomes helpless and it simply cannot do anything except making a representation to the President. In order to prevent the Governor from functioning in an arbitrary manner and in order to act as a check on the recalcitrant Chief Minister, Nath Pai moved a Bill in the House of the People that "if more than 50% of the members of an Assembly or Parliament require in writing that the Assembly or Parliament be called in session, it shall be obligatory on the part of the Speaker of the Assembly or Parliament as the case may be to summon the Assembly or Parliament within a fortnight of the receipt."[42] This amendment of the Constitution seems to be commendable. Similar Bill was introduced in Rajya Sabha by Sita Ram Jaipuria.[43] The Speakers' Conference also made more or less a similar recommendation.[44]

SUMMONING WITHOUT THE ADVICE OF THE CHIEF MINISTER

No doubt the floor of the Legislative Assembly is the proper place to test the strength of the rival parties and this is

also the recommendation of the Presiding Officers' Conference held in New Delhi on April 8, 1968.[45] Even the Governors' Committee agreed with this when it recommended that "the test of the confidence in the Ministry should be normally left to a vote in the Assembly."[46] (p. 44.) When, the majority of the Chief Minister becomes doubtful either because of defections or because some of the parties in the coalition Government withdraw from it, if the Chief Minister himself either advises the Governor to summon the session, or resigns as was done by Biswanath Das in Orissa after the Utkal Congress withdrew support from him,[47] then there would be no problem. If the Chief Minister agrees to face the Assembly on the advice of the Governor, even then there would be no complication. Such a course of action was adopted by Parkash Singh Badal, the ex-Chief Minister of Punjab in 1971. The problem, however, would arise if the Chief Minister, taking the advantage of article 174 (1) which permits a gap of six months between two sessions, refuses to face the Assembly in spite of the reduced strength of his party and that too in spite of the repeated advice of the Governor.[48] The question would arise, should the Governor summon the Legislative Assembly even without the advice of the Chief Minister or not? On this point conflicting views have been expressed by imminent jurists, politicians, the members of Parliament and the State Legislatures, the Home Ministry, the Law Ministry and the Governors. The Law Ministry is of the view that the Governor has no power to summon the State Legislature against the wishes of the Chief Minister in order to ascertain whether the present Government still enjoyed the necessary support.[49] Even some of the Governors agreed with this view at the Governors' Conference held in New Delhi in November, 1967.[50] B. Gopala Reddy, the Governor of UP while rejecting the demand of the opposition to summon the session when C.B. Gupta lost majority, said: "Persons belonging to various political parties were criticising him for not summoning the Assembly. He pointed out that he was only acting in accordance with the Constitution. The question whether the Gupta Ministry continued to have the support of the majority of MLAs was one which had to be decided on the floor of the House. A Governor he emphasised could not curtail the powers of the people's representatives."[51]

N. Sanjiva Reddy, the former Speaker of Lok Sabha also agrees with this view when he says that "the Constitution gave a right to a Chief Minister to recommend to the Governor the date on which the House should be summoned. The right of the Chief Minister or the Cabinet is absolute. The Governor may suggest an alternative date but it should be left to the Chief Minister or the Cabinet to decide it."[52]

Since the controversy about the powers of the Governor in this respect has evoked a countrywide interest, therefore, it needs not only a detailed but a careful and dispassionate examination. For this purpose article 174 (1) as worded in the Constitution will have to be studied carefully along with its background as explained in the Constituent Assembly. The article says that "the Governor shall from time to time summon the House or each House of the State Legislature to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting." Since this article is a carbon copy of article 85 (1) which empowers the President to summon each House of Parliament, therefore, the powers of the Governors in this respect seem to be the same as are the powers of the President of India.

If the debates of the Constituent Assembly are studied carefully, it will be found that the summoning of Parliament is more a duty of the President than that of a right of the Prime Minister. Some of the members of the Constituent Assembly expressed apprehensions that there is no remedy if the President does not summon the Parliament under article 85 (1) in spite of the advice of the Prime Minister. Professor K.T. Shah, therefore, wanted to empower the Presiding Officers of both Houses of Parliament "provided that if at any time the President does not summon as provided for in this Constitution, for more than three months."[53] Opposing this amendment, Dr B.R. Ambedkar, the Chairman of the Drafting Committee said that "then we have a right to impeach him, because such a refusal on the part of the President to perform obligations which have been imposed upon him would be undoubtedly violation of the Constitution."[54]

This reply of Dr B.R. Ambedkar proves that the summoning of the session of Parliament and State Legislatures is not only the right but also a duty of the President and State Governors. In the

normal course, the session of the Assembly should be summoned by the Governor on the advice of the Chief Minister, provided he has a majority in the State Legislature. But the moment there are doubts about his following in the State Assembly and if the Chief Minister does not want to face it on one pretext or the other the Governor, it appears has the powers of summoning it even without the advice of the Chief Minister. K. Santhanam,[55] L.M. Singhvi,[56] Administrative Reforms Commission[57] C.K. Daphtary[58] and M.C. Chagla[59] all agree with this view. Even Y.B. Chavan said on November 16, 1967: "I completely disagree with my friend Shri Nath Pai. The Governor has discretion to ignore the advice of the Chief Minister and call the Assembly."[66]

Hence, it is difficult to accept the view that the Governor cannot summon the State Legislature without the advice of the Chief Minister. G.S. Pathak, at present the Vice-President of India (the former Governor of Mysore and the former Law Minister, Government of India) agrees with this view when he says that the Governor can summon the State Legislature without the advice of the Chief Minister.[61]

It is significant to note that Dharam Vira, the former Governor of West Bengal dismissed the Ministry when his advice of summoning the State Legislature was not accepted. But it appears that it would have been better if the Governor instead of dismissing the Ministry on this ground, had summoned the Assembly by exercising his discretion because it is a power clearly given to him by article 174 (1) of the Constitution and the argument that "the Governor has to act on the advice of his Council of Ministers, because the latter alone provides business for a session of the Legislature (p.53),"[62] has no merit because the notice of the opposition for a vote of no confidence, by itself provides a sufficient business for the session.

There are certain functions which have been expressly and specifically vested in the Prasident and the Governor by various provisions of the Constitution. They cannot be delegated to any other person. D.D. Basu has stated that "the result is that though all the executive power of the Union is also vested in the President by article 53 (1), a distinction is to be maintained which are vested in the President by Article 53 (1) generally, and the other provisions of the Constitutions such as articles 123, 124, 217, 268-279, 309, 310, proviso (c) to article 311 (2), 338, 340,

344, 356, 360, which specifically vest particular functions in the President. The later powers cannot, according to the Supreme Court, be delegated by the President to other person or authority, but must be exercised by the President personally."[63]

Since article 85 (1) of the Constitution which empowers the President to summon each House of Parliament, belongs to the category of the article mentioned above and article 174 (1) is a carbon copy of article 85 (1), therefore, it seems that it is a power given to the Governor, which he can exercise independently, at least in extraordinary circumstances.

This contention is further supported by the fact that the power of summoning the State Legislature has been given by the same article which has given the Governors, the power of proroguing and dissolution and that too in the same unambiguous language. About the power of dissolution it has already been conceded both by the Law Ministry and Home Ministry that the Governor may exercise his discretion.[64] About the power to prorogue the Supreme Court has declared that "article 174 (2) which enables the Governor to prorogue the Legislature does not indicate any restriction on his power."[65] According to the Mysore High Court "the power of proroguing a session of the Legislature is exclusively that of the Governor in whom rests the power to summon the same."[66] The use of the expression "exclusively" is very important.

Therefore, it is difficult to accept the extra constitutional twists given by the Home Ministry or by the Law Ministry particularly because these Ministries have given different interpretations of this article at different times. For instance, in the case of Madhya Pradesh the then Home Minister came forward with a theory that "a defeated Chief Minister had the constitutional right to ask for dissolution of the Legislature and that the Governor had no discretion to refuse it."[67] Even Mrs Gandhi, the Prime Minister of India, told the press correspondents that "the Governor has a constitutional obligation to accept the advice of his Chief Minister in regard to the dissolution of the Assembly whether the Chief Minister at the time of giving such advice enjoyed majority support or not."[68] However, when Gurnam Singh, the then Chief Minister of Punjab, resigned, he advised the Governor to dissolve the Legislative Assembly and order fresh elections,[69] but the advice was not accepted by the

Governor.[70] Strangely enough, in this case the legal experts of the Central Government who had already given different opinion, agreed with the Governor.[71] This to some extent proves that the advice of the Law Ministry or that of the Home Ministry is not dependable and the possibility that the Home Ministry may reverse its stand in respect of summoning the State Legislature by the Governor, cannot be completely ruled out because it seems that this position is constitutionally untenable.

If it is accepted that the State Assembly can be convened only on the advice of the Chief Minister, then its logical corollary that the Governor would be bound to advance the date of the session after it has already been announced or prorogue the session, whenever such advice is given to him by the Chief Minister, will have to be accepted. In other words, in the matters of summoning or proroguing the State Legislatures and shifting the dates of the session, the Governors will have absolutely no powers.

Hence, it can be concluded that in view of the conflicting opinions expressed by the Home Ministry, the Law Ministry, leaders of the various political parties and the Governors at different times, the powers of the Governor in this respect, though explicitly given by the Constitution, will remain obscure, unless either the advisory opinion of the Supreme Court is sought on this point as suggested by the West Bengal Chief Minister in November 1967 or one of the Governors exercises his discretion in this respect[72] and his action is challenged in the Supreme Court. But if the Governor summons the session of the State Legislature without the advice of the Chief Minister, his action may be considered by some of the Pandits of Constitutional Law as a violation of the spirit of the Constitution. For their satisfaction following judgement of the Supreme Court is quoted:

> An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiments and emotions; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does support that view.[73]

It was because of this approach of the Supreme Court towards the Constitution that in the case of West Bengal Immunity Co. Ltd., Vs. the State of Bihar (1955), in which it had the distinction

VIII

Powers to Prorogue the State Legislature

PROROGATION AND THE ADVICE OF THE CHIEF MINISTER

Besides summoning the State Legislature, the Governor has the power to prorogue the Legislative Assembly under article 174 (2) (a). It may, however, be asked in this connection as to whether the Governor should exercise his individual judgement or he should always act on the advice of the Chief Minister while exercising this power. On this point there are two schools of thought. According to the first school of thought, the Governor should always act on the advice of the Chief Minister but according to the other school, the Governor may in exceptional circumstances exercise his individual judgement. For instance, K.C. Reddy, the former Governor of Madhya Pradesh,[1] B. Gopala Reddy, the former Governor UP,[2] Y.B. Chavan,[3] Govinda Menon[4] and A.K. Sen,[5] both the former Law Ministers, Government of India, are of the opinion that the Governor should exercise this power on the advice of the Chief Minister. The Madras High Court also agrees with this view.[6] But persons like N.G. Ranga,[7] N.C. Chatterjee,[8] Nath Pai,[9] Acharya Kripalani[10] and C.K. Daphtary[11] do not agree with this view. According to Daphtary, the former Attorney General of India, "the power of the Governor to prorogue the House and to summon the House at a place and time which he thinks fit is an absolute power given under the Constitution."[12] H.V. Pataskar, the former Governor of Madhya Pradesh also agrees with this view.[13]

Since conflicting opinions have been expressed on this point by persons equally imminent both in the field of constitutional law and public life, hence, this controversy should be minutely

examined. No doubt ordinarily, the power to prorogue the House should be exercised by the Governor on the advice of the Chief Minister provided that he has a majority in the Legislative Assembly. But the problem arises when the Chief Minister advises the Governor to prorogue the House in order to prevent a vote of no-confidence against himself or against the Speaker on the floor of the House. For instance, in Madhya Pradesh in 1967 when G.N. Singh, with his 37, supporters defected from the Congress party and thereby reduced the Ministry of D.P. Mishra to a minority in the budget session, the Chief Minister advised the Governor to prorogue the House and the Governor accepted his advice.[14]

Similarly, on August 25, 1969, the opposition in UP demanded a surprise diversion over the grants relating to jails and civil defence department and when the process of voting had begun, there was some commotion and the Speaker adjourned the House for some time. "Because of the continued disorder the Speaker adjourned the House, with the Deputy Chief Minister and the leader of the House in agreement. Next day the House was again in commotion and the police had to be brought in to remove some members. The opposition alleged partiality on the part of the Speaker and his resignation was demanded. The House was adjourned *sine die* on August 30 and later the Governor prorogued it."[15] At that time a resolution for the removal of the Speaker was also pending.[16]

More or less a similar incident happened in Punjab. The Assembly was to meet on April 5, 1968 to consider the official motion for the removal of the Speaker but it was prorogued on April 2, 1968 on the advice of the Chief Minister.[17] Similarly in February 1970 in Haryana, the Assembly was prorogued when a vote of no-confidence against the Chief Minister Shri Bansi Lal was pending.[18] Similarly when 35 out of 62 MLAs of the Congress party in Jammu and Kashmir withdrew support from Sadiq in favour of Mir Kasim, he got the session prorogued on March 3, 1970[19] during the budget session.

Whenever, such a situation develops, it may be asked as to how far will it be constitutionally proper on the part of the Governor to accept the advice of the Chief Minister to prorogue the House in the middle of the session. K.C. Reddy, the Governor of Madhya Pradesh defended his action on the ground that

"he was sure that under the Constitution, he was required to accept the advice of Chief Minister. This was the practice in UK and in many other democracies."[20] He said that in UK even when a defeated Prime Minister had asked for dissolution of Parliament, almost on all occasions the advice had been accepted by the Monarch."[21]

Y.B. Chavan agreed with this view when he said that "following the defection of 36 members of the Congress party in the Assembly, there was an allegation of intimidation and wrongful detention of members of the Assembly. Two of the signatories to the defection stated that they signed under duress. In view of the state of general tension and abnormality the Chief Minister requested the Governor to consider proroguing the House for the present. After full consideration of the letter of the Chief Minister and the attendent circumstances, assessing the requirement of correct Parliamentary practice, the Assembly session for the present was prorogued in the interest of proper functioning of Parliamentary democracy."[22] Y.B. Chavan also said that "constitutional issues are impersonal issues. Constitutional issues are non-partisan issues. You cannot consider or interpret the Constitution taking into consideration the Congress Government once and then take the Constitution and try to interpret it in another way taking into consideration the non-Congress Government. The same criteria will have to be applied to the non-Congress Government and to the Congress Government...Let us try to find out what exactly is the constitutional role of the Governor...The Constitution is very clear on this point. The Governor of a State is a constitutional head except in three articles. I have referred to the latest scholarly edition of the Constitution published by Mr Seervai, the Advocate General of Maharashtra and he has said that only under three Articles the Governor of a State functions as an agent of the President. They are Articles 239 (2), 200 and 356. Except in these Articles, the Governor functions as the Constitutional Head. This position we have to accept...Once we accept this constitutional position, the point is whether in this matter, the Chief Minister ought to have given him the advice that he gave him or he could have given him some other advice. Let us certainly argue in a theoretical way; possibly I may agree with you or may not agree with you. But once having received the advice from the Chief Minister, let us

not take into consideration whether the Chief Minister is Ajoy Babu, Mishra, let us not go into the names because then the matter becomes subjective; let us be objective. The point is when a Chief Minister gives an advice to the Governor, as Members of Parliament, as politicians, as democrats, as the supporters of the Constitution, what is our position? When an advice is given by the Chief Minister to a Governor, the question is whether the Governor is bound by his advice or not. My answer to that is that he is bound to accept the advice."[23] and "he was very much right in accepting it. There could be no other course open to him."[24] P. Govinda Menon the then Law Minister in the Government of India, agreed with this view when he said that "under the Constitution there are a few matters on which the Governor may act in his discretion, but this is a matter on which the Governor acts on the advice of the Chief Minister and that is what the Governor himself has told our Home Minister."[25] He also said that "D.P. Mishra, till he is proved not to have a majority, is the Chief Minister of the State. So, Sir, the Governor was in his right to heed to his advice."[26]

A.K. Sen, while defending K.C. Reddy said that "the second principle is that if the autonomy of the State is to be maintained and if the Governor has to act as a constitutional organ, then the Governor must act on the advice of the Chief Minister so long as he remains the Chief Minister, unless he is removed by the constitutional process with which we all are aware...If the Governor has to act on the advice of the Chief Minister, who are we to tell him, that he must act in a different manner? If the budget has to be passed, if the Assembly has to be conducted, then the shifting of the groups suddenly in the middle of the budget session disturbs the functioning, and if the Chief Minister feels that a few days are necessary for the purpose of the smooth conduct of the budget session...interruptions."[27] B. Gopala Reddy, the Governor of UP, while defending his action wrote to the President that "Summoning and prorogation of the House were made on the advice of the Government and the Governor acted on its advice."[28]

The contention that the Governor is to go by the advice of the Chief Minister in proroguing the House, perhaps cannot be accepted *in Toto*. One of the arguments given by the Governors committee as to why the Governor cannot exercise his individual

judgement in summoning the Assembly was that "The Governor has to act on the advice of his Council of Ministers, because the latter alone provides business for a session of the Legislature (p.53)."[29] But this argument cannot be advanced in the case of prorogation of the House in the middle of session. Hence, it seems that the Governor can exercise his own discretion in this respect at least in certain extraordinary situations and this position has been accepted even by the Governors' Committee itself, when it says that "as regards prorogation, the Governor should normally act on the advice of his Council of Ministers. (p. 53). But if a Chief Minister advises prorogation of the Legislative Assembly when a notice of a motion of no confidence is pending, the Governor should first satisfy himself that the notice of the no-confidence motion is "not frivolous and is a genuine exercise of the parliamentary right of an opposition to challenge the Governments majority."[30] (p. 54). If so satisfied, the Governor should ask the Chief Minister to face the Assembly and allow the motion to be voted upon. (p. 54)."[31] This shows that the Governor, has a discretion in this respect which must be judiciously exercised. This contention is supported by the Mysore High Court which has held that "the power of proroguing a session of the Legislative is exclusively that of the Governor in whom rests the power to summon the same."[31]

Supreme Court agrees with this view when it says that "article 174 (2) (3) which enables Governor to prorogue the Legislature does not indicate any restriction on this power. Whether the Governor will be justified to do this when the Legislature is in session and in the midst of its Legislative work, is a question that does not fall for consideration here. When that happens, the motives of the Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers."[32]

Hence, to prorogue the Assembly in the middle of the session in order to save the Ministry from being defeated on the floor of the House, seems to be constitutionally improper at least because the Governor should see that the executive has the continued and open support of the Assembly. While defending the dismissal of the Ministry of Ajoy Mukherjee in West Bengal, Y.B. Chavan said that' it is the duty of the Governor to bring the Executive and the Legislature face to face with each others...Here really speaking,

a situation has arisen for a judgement, because certain people had come and informed the Governor and given in writing to the Governor that they were no longer supporting the Government party. The Governor was clearly in the know of the things that the Chief Minister had lost the majority."[34] But strangely enough the Governors of Madhya Pradesh and Jammu and Kashmir instead of allowing the Executive and the Legislature to face each other, came in between during the budget session, which is the session when the principle of Ministerial responsibility is put to test in the most crucial manner. It was done by the Governor, knowing fully well that D.P. Mishra and G.M. Sadiq have lost the majority and hence, to prorogue the budget session at such a crucial time perhaps cannot be justified. The action of the West Bengal Governor was commended by the then Home Minister because he was trying to bring the Executive and the Legislature face to face with each other. But by following the same analogy, why should the action of the Governor of Madhya Pradesh and that of Jammu and Kashmir be not condemned because they did not allow the Executive and the Legislature to face each other.

Even if the proposition that the Governor is bound to accept the advice of the Chief Minister in proroguing the House is accepted, the actions of the Governors of Madhya Pradesh, UP Punjab, and Haryana, Jammu and Kashmir cannot be justified because according to the report of the Governors' Committee even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it is not necessary for him to accept the advice immediately and automatically. "In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice,"[35] finally in this sphere (p. 20). This shows that the acceptance of the advice of Chief Minister to prorogue the House during the budget session in Madhya Pradesh and Jammu and Kashmir[36] was perhaps not constitutionally proper on the part of the Governors and so also the prorogation of sessions in UP and Punjab when a motion of no-confidence against the Speakers was pending. If the contention that the Governor is bound to accept the advice of the Chief Minister to prorogue the Assembly, is accepted, then the possibility of this power being misused by the Chief Ministers cannot perhaps be

ruled out. This contention is supported by the letter of the Governor of Haryana to the President, in which he said that "What would be more unfortunate is that as soon as one party establishes its majority in a trial of strength in the Assembly it would like to get the Assembly prorogued. It could then maintain in power at least for the next six months without being required to convene the Assembly."[37]

It may, however, be asked as to whether the Governor should never exercise this power during the session on the advice of a Chief Minister who has lost the confidence of the Assembly or are there certain exceptions to this rule? The Governor it seems, should not exercise this power during the session when the Chief Minister who seems to have lost the confidence of the Assembly, advises the Governor to do so, in order to gain time so that he may strengthen his position. But if the Chief Minister submits his resignation during the session and then as a care taker Chief Minister advises the Governor to prorogue the Assembly, the Governor has no alternative but to accept the advice. Such a situation developed in Madhya Pradesh on March 12, 1969. When the budget was being discussed, 30 MLAs defected from the United Front Ministry headed by Govind Narayan Singh.[38] The Chief Minister knowing well in advance, that his budget would be rejected submitted his resignation and advised the Governor to prorogue the Assembly. In that situation the Governor had no alternative but to accept the advice of the Chief Minister because after resignation, G.N. Singh "posed a question before the Governor, whether after his resignation, he was bound "constitutionally and legally" to head the SVD Government as a care taker. The Chief Minister asked the Governor to think over a situation in which he refused to act as "Care taker Chief Minister'. There could be another situation if a no-confidence motion against him was issued in the House. Why should he face such an ugly situation when he had voluntarily resigned his office, he told the Governor."[39] It may, however, be mentioned that when a similar situation developed in Gujarat in March 1971, the Assembly was merely adjourned.[40]

When the Governor prorogued the Assembly on the advice of a care taker Chief Minister in Madhya Pradesh during the first session, the issue was raised in the Lok Sabha and some of the members criticised the Governor for accepting the advice of the

care-taker Chief Minister in this connection.[41] But while defending the Governor, Minister of States for Home Affairs, V.C. Shukla said that "the Constitution did not make any difference between Chief Minister and the care-taker Chief Minister. The Government of India had been consistent in this matter and referred to a similar situation two years ago in Madhya Pradesh. If the advice is given, the Governor is bound to accept it."[42] But it seems that the Government and the Opposition are wrong here. The Opposition was wrong because in that situation the Governor had hardly any other alternative but to accept the advice of the out-going Chief Minister and the Government was wrong because there certainly is a difference between the Chief Minister and a care-taker Chief Minister in the sense that in the middle of the budget session if the Chief Minister gives an advice to prorogue the session in order to avoid an immediate vote of no-confidence, the Governor should not accept the advice but when a care-taker Chief Minister does so, he will be justified in accepting his advice. Hence, there is a difference between these two types of Chief Ministers, and it is difficult to agree with Chavan when he says that "some opposition members argued that the Governor should not have prorogued the Assembly even though he was called upon to do so by the out-going Chief Minister. A distinction was sought to be made between 'continuing Chief Minister' and an 'out-going' one. This is not warranted by the Constitution."[43] This is not so because there is a difference between the 'out-going Chief Minister' who has lost the confidence of the Assembly and resigned and the 'continuing Chief Minister' who has the majority in the Assembly.

PROROGATION OF THE HOUSE FOR ISSUING AN ORDINANCE

It may, however, be mentioned here that if the Chief Minister has a majority in the Assembly and then if he advises the Governor to prorogue the session so that an urgently needed ordinance may be issued, the Governor may be justified in accepting this advice. For instance, in Punjab during the budget session the Assembly was put in a state of inaction for two months by the Speaker by adjourning it under Rule 105, as the time was running out and the budget session of the Assembly had to reach a conclusion before March 31, because after that date no money

could be drawn from the Consolidated Fund according to article 266 (3). Then the Governor had to act quickly to put back the legislative machinery of the State into life and for this purpose the Governor prorogued the Assembly on the advice of the Chief Minister to get rid of the adjournment, and then issued an ordinance under article 209 to enable the Assembly to pass the budget. This action of the Governor was considered proper by the Supreme Court.[44] The Madras High Court had already given decisions that "there was nothing to prevent the Governor from proroguing a House merely in order to enable him to issue an ordinance."[45] The Allahabad High Court agrees with this view.[46]

PROROGATION IN CONSULTATION WITH THE SPEAKER

It may, however, be asked as to how far will it be proper for the Governor not to consult the Speaker before the House is prorogued. Before Independence when Vitthal Bhai Patel was the Speaker, "he insisted that the British Government should consult him before it would possibly prorogue the House or suspend the session of the House and that the Government had a good sense to agree and they used to consult him."[47] But after Independence, it seems that this practice is not followed. For instance, in Madhya Pradesh, when the Assembly was prorogued in 1967 on the advice of the Chief Minister, the Speaker was not consulted. The conduct of the Governor was criticised by Surendra Nath Dwivedi on this ground when he said that "the more objectionable thing is that this order was not passed last night. The Speaker was also not informed about this earlier. When the Speaker came to the House and the members started asking questions, the Speaker said "I understand that a prorogation order is coming, so I cannot proceed."[48] Similarly, in 1969 the Governor of Madhya Pradesh again prorogued the House without informing the Speaker earlier.[49] Though in Punjab, the Governor prorogued the Assembly without informing the Speaker,[50] but the propriety of the Governor of Punjab cannot be questioned because here the Speaker was preventing the Legislature from passing the budget by adjourning it for more than two months.

WHEN DOES THE PROROGATION BECOME EFFECTIVE?

Another question which may be asked about the powers of the Governor to prorogue the House is as to whether the prorogation becomes effective the moment the notification is signed by the Governor, or when the notification reaches the member. This point was raised in the Punjab Assembly by Gurnam Singh, a retired Judge of the Punjab High Court. He said that "the prorogation of the House could be considered effective only from the day on which the members received the notification. Gurnam Singh said that under the rules none but the Assembly Secretary could notify prorogation."[51] The Speaker accepted this contention.[52] But the Supreme Court rejected both the contentions and held that :

> "Article 174 (2) which enables the Governor to prorogue the Legislature does not indicate the manner in which the Governor is to make known his orders. He can follow the well-established practice that such orders are ordinarily made known by a Public notification which means no more than that they are notified in the official Gazette of the State, where there was such a notification on the 11th March, prorogation must be held to have taken effect from the date of publication. It was not necessary that the order must reach to every member individually before it would become effective. Rule 7 which is framed under article 208 of the Constitution regulates the procedure of the Legislature but is not intended to add a clause to article 174 (2) so as to make it incumbent on the Governor to wait till the Secretary takes his time and issues the notification (if at all) and informs members. The action of the Secretary in sending copies of the Gazette to the members is merely ministerial. Rule 7 cannot be read as a condition precedent for the efficacy of the Governor's orders provided it was duly notified."[53]

Hence, according to this decision of the Supreme Court the prorogation becomes effective the moment it is notified in the official Gazette and it only needs the signatures of the Governor.

UNJUSTIFIED ADJOURNMENT AND PROROGATION

It will not be out of place to mention here that ordinarily the Governor prorogues the Assembly after it has been

adjourned *sine die* by the Speaker. But it does not mean that it cannot be prorogued when the Assembly has merely been adjourned instead of being adjourned *sine die*. Such a situation developed in Punjab when the Speaker Joginder Singh Mann adjourned the Assembly on March 7, 1968 for a period of two months[54] during the Budget session. The adjournment of the Legislative Assembly in the month of March would mean that the budget would not have been passed and then the problem was as to what should be done. In order to solve this problem the Governor prorogued the Assembly on March 11, 1968 under article 174 (2) of the Constitution[55] and re-summoned the Assembly. This prorogation was held valid by the Supreme Court.[56] It means that the Governor can prorogue it not only when it has been adjourned *sine die* but also when it has been merely adjourned. This happened even in Madras in November 1972 when K.A. Mathialagan the Speaker adjourned the Assembly abruptly on November 13, in order to prevent a vote of no-confidence.[57]

NOTES

1. *Statesman*, July 23, 1967, p. 1.
2. *Patriot*, September 13, 1969, p. 4.
3. *Lok Sabha Debates*, 4th Series, Vol. 7, Nos. 41-45, July 20, 1967, Col. 13496.
4. *ibid.*, Col. 13435
5. *ibid.*, Col. 13470-70.
6. It says that "in the matter of prorogation the Governor is bound by the advice of the Council of Ministers." Mathialagan Vs. Governor of Tamil Nadu, *The Madras Law Journal*, February 8, 1973, Vol. 144-5 & 6. p. 131.
7. *Lok Sabha Debates*, Vol. 7, Nos. 41-45, July 20, 1967 Col. 13470.
8. *ibid.*, Col. 13437.
9. *Statesman*, July 23, 1967, p. 1.
10. *ibid.*
11. *ibid.*
12. *Patriot*, July 16, 1968, p. 1.
13. *National Herald*, July 28, 1967.
14. *Statesman*, July 23, 1967, p. 1.
15. *Patriot*, September 13, 1969, p. 4.
16. *Hindustan Times*, September 22, 1969, p. 6.
17. *Statesman*, April 3, 1968, p. 1.
18. *ibid.*, April 5, 1970, p. 9.

19. *ibid.*, March 14, 1970, p. 8.
20. *ibid.*, July 23, 1967, p. 1.
21. *ibid.*
22. (a) *Lok Sabha Debates*, Vol. 1, Nos. 41-45, July 20, 1967, Col. 13412.
    (b) In April 1970, however, Y.B. Chavan told Parliament that "in exceptional circumstances" such as when a no-confidence motion is pending against the Government, the Governor can refuse to accept the Chief Minister's advice and ask him to face the Assembly. *Statesman*, April 8, 1970, p. 1.
23. Y. B. Chavan *Lok Sabha Debates*, 4th Series, Vol. 7, Nos. 41-45, July 20, 1967, Cols. 13495-96.
24. *ibid.*, Col. 13502.
25. *ibid.*, 13434.
26. *ibid.*, Col. 13435.
27. *ibid.*, Col. 13470-70.
28. *Patriot*, September 13, 1969, p. 4.
29. *Journal of the Society for Study of State Governments*, Volume V, January-March, 1972, No. 1. pp. 68-69.
30. *ibid.*, p. 69.
31. Siddaveerappa & others, Vs. the State of Mysore, *AIR*, 1971, Mysore 200.
32. State of Punjab Vs. Satya Pal, *AIR*, 1969, SC 903.
33. When the vote of no-confidence was pending against the Chief Minister of Haryana and the Governor prorogued the session, Gurdial Singh Dhillon the Speaker of Lok Sabha said that "without casting the remotest reflection on the Haryana Assembly or the Speaker it was not proper to adjourn the House *sine die* after fixing date for discussion of the no-confidence motion. "The Home Minister, however, defended the Governor. *Patriot*, March 4, 1970, p. 5.
34. *Lok Sabha Debates*, 4th Series, Vol. 10, Nos. 11-15, December 4, 1967, Col. 4556.
35. *Journal of Society for Study of State Governments*, Vol. V, January-March, 1972, No. 1, p. 59.
36. In Rajya Sabha V. C. Shukla said: "It is true that under section 350 of the State Constitution the Governor is bound by the advice of the Council of Ministers; there is no doubt about it." *Rajya Sabha Debates*, Vol. 71, No. 17, Col. 142, March 16, 1970. It means in other States he is not bound because there is no article like this in the Constitution.
37. *AIR*, 1968, Punjab, 942.
38. *Tribune*, Ambala Cantt., March 13, 1969, p. 8.
39. *ibid.*
40. A vote of no-confidence was moved against Hitendra Desai which was to be discussed in the House on March 31. In anticipation of a probable defeat Desai sent his letter of resignation in the morning on March 31, *Those Ten Months of President's Rule in Gujarat*, p. 7.
41. *Lok Sabha Debates*, 4th series, Vol. 25, Nos. 16-20, March 12, 1969, Col. 228.
42. *Times of India*, March 15, 1969, p. 12.

43. *Hindustan Times*, March 14, 1969, p. 9.
44. State of Punjab Vs. Satya Pal, *AIR*, 1969, SC, 902.
45. *Tribune*, April 25, 1968, p. 7.
46. Vishwanath Aggarwal Vs. State of UP, *AIR*, 1956, Allahabad, 561.
47 N. G. Ranga, *Lok Sabha Debates*, 4th Series, Vol. 7, Nos. 41-45, July 20, 1967, Col. 13437.
48. *ibid.*, Col. 13491.
49. *ibid.*, Vol. 25, Nos. 16-20, March 12, 1969, Col. 247.
50. State of Punjab Vs. Satya Pal, *AIR*, 1969, SC, 902.
51. *Hindustan Times*, March 21, 1968, p. 10.
52. *ibid.*
53. State of Punjab Vs. Satya Pal, *AIR*, 1969, SC, 903.
54. *Statesman*, March 8, 1968, p. 1.
55. *Patriot*, March 13, 1968, p. 1.
56. State of Punjab Vs. Satya Pal, *AIR*., 1969, SC, 902.
57. The motion of loss of no-confidence against the Speaker was received in the Assembly Secretariat on October 30 and it was to be discussed on November 14, 1972 when the requisite 14 days' notice for such motions was completed. But the Speaker adjourned the Assembly abruptly on November 13 until December 5, 1972. The Governor prorogued both the Houses of the State Legislature on the advice of the Chief Minister w.e.f. November 15, 1972 *Statesman*, November 15, 1972 p. 1

IX

Powers to Dissolve the Assembly

Besides summoning and proroguing the session of the legislature, the Governor has the power to dissolve the Legislative Assembly under article 174 (2) (b) of the Constitution. It may, however, be asked in this connection as to how far the advice of the Chief Minister to dissolve the Legislative Assembly is binding on the Governor. This controversy started from Madhya Pradesh, when in July 1967, G.N. Singh along with 37 supporters defected from the Congress party and thereby reduced the Ministry of D. P. Mishra to a minority in the Assembly.[1] At that time the Chief Minister, after getting the session prorogued, declared that he would advise the Governor to dissolve the Assembly and the then Home Minister Y.B. Chavan came forward with a theory that "a defeated Chief Minister had the constitutional right to ask for a dissolution of the Legislature and the Governor had no discretion to refuse it."[2] Even Mrs Gandhi, the Prime Minister, told the Press correspondents that "Governor has a constitutional obligation to accept the advice of his Chief Minister with regard to dissolution of the Assembly whether the Chief Minister at the time of giving such advice enjoyed majority support or not."[3]

Similarly, when 15 legislators in Haryana defected from the Congress party and thereby reduced the ministry of Bansi Lal to a minority in the Assembly, Y.B. Chavan is again reported to have expressed the view that "if a Chief Minister recommended the dissolution of the State Assembly, the Governor was bound to accept. That was the constitutional position and that was his view too. He was replying to an agitated opposition member who had questioned the propriety of Home Ministry officials contending that the Haryana Governor was obliged to dissolve the Assembly if the Chief Minister advised."[4] This view of the Home Ministry was also broadcast

by the All India Radio.[5] However, there are others who do not agree with this view and it seems that the Home Ministry expressed these views just to pressurise the legislators so that under the threat of dissolution, the defectors may come back to the Congress fold and the further defections from the Congress may stop.

There is absolutely no doubt that the Governor has a discretion[6] so far as the dissolution of the Legislative Assembly is concerned and there is no ambiguity in this respect. This is also the opinion of the Committee of the Governors.[7] K. C. Reddy, the Governor of Madhya Pradesh agreed with this view when he said that :

"In normal circumstances the Governor, as the constitutional head, was required to act with the aid and by the advice of his Council of Ministers. But on certain occasions he had to exercise his functions in a discretionary manner... The question of recommending dissolution of the Assembly and invoking presidential proclamation under the relevant Article of the Constitution called for exercise of the Governors discretion... He said the question of the Governor acting on the advice of the Council of Ministers did not arise in such a case and, therefore, was no reason for accepting the outgoing Chief Minister's advice."[8]

This contention of the Governor is supported by the language of the Constitution itself. The use of the expression "may" in article 174 (2) shows that the advice is not binding. This contention is supported by clause (1) of article 174 which says that "the Governor shall from time to time summon the House or each House of the State Legislature at such time and place as he thinks fit." The use of expression "shall" in clause (1) and "may" in clause (2) of the same article is quite significant. No doubt some times "may" means "shall" but it seems that this is not the case here. Here it may also be mentioned that in case if he decides, while exercising his individual judgement, not to accept such advice then his decision cannot be challenged in any court of law.[9]

It is also significant to note that article 174 (2) (b) is a carbon copy of article 85 (2) (b) which empowers the President to dissolve the House of the People. While speaking on article 85 (2) (b) Dr B. R. Ambedkar said that "the President of the Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the

affairs should be carried on with some other leader without dissolution..."[10] Hence, B.R. Ambedkar agrees with the view that the President is not bound by the advice to dissolve the House of the People. The position of the Governor is also the same in this respect.

DISSOLUTION WHEN CHIEF MINISTER HAS A SOLID MAJORITY

In spite of the fact that the Governor has a discretion whether to dissolve the Assembly or not, on the recommendation of the Chief Minister, but in case the Chief Minister has a solid majority in the Assembly, and if he advises the Governor for dissolution the Governor would ordinarily accept this advice. But there is one exception to this rule, that is, if the Chief Minister, without submitting his own resignation, advises the Governor to dissolve the Assembly, a few days before the beginning of the budget session, the Governor will have no alternative but to reject the advice because the acceptance of this advice would mean that the Ministry would stay in office till the elections are held, without getting the budget passed. According to the opinion of the Home Ministry, the budget cannot be passed by an ordinance and Parliament too will not be in a position to pass it so long as there is a Ministry in the State. Parliament can pass the budget of the State only when the President's rule has been imposed in the State. Hence, before passing the budget, if the Chief Minister even with a solid majority, advises the Governor to dissolve the Assembly, the proper course of action for him would be to recommend the imposition of President's rule. In case the budget has been passed, the Governor would normally accept the advice of the Chief Minister with a solid majority.[11]

The Committee of the Governors agrees with this view[12] and this was one of the main reasons why dissolution was not granted to Hitendra Desai, in Gujarat in spite of the fact that he claimed the support of 87 members in a House with effective strength of 163.[13] However, in West Bengal,[14] in Punjab,[15] and in Bihar[16] in 1971, the Assemblies were dissolved under article 174 (2) (b) without getting the budget passed, which was somewhat constitutionally improper on the part of the Governor.

DISSOLUTION WHEN THE CHIEF MINISTER HAS A SHAKY OR A DOUBTFUL MAJORITY

Whenever, the Chief Minister has a dangerously narrow and shaky or a doubtful majority ; the Governor may or may not dissolve the Assembly on his recommendation. For instance, in November 1967, in Haryana, Rao Birendra Singh recommended the dissolution of the Assembly when his majority in the Assembly was shaky but the advice was not accepted and the Governor in his report to the President recommended the imposition of the President's rule.[17] Similarly, when Hitendra Desai recommended dissolution of the Assembly on May 11, 1971, he claimed to have a support of 89 MLAs in a house of 163; the advice however, was not accepted, firstly, because the Governor thought that his majority had become doubtful because of the defections from his party which were going on at that time[18] and secondly, because the budget had not been passed.[19] On the other hand in Punjab,[20] and West Bengal[21] in 1971 and in Kerala[22] in 1970, in Bihar in 1971,[23] the Assemblies were dissolved under article 174 (2) (b) on the recommendations of the Chief Ministers when they had doubtful majority in the Assemblies.[24] It may be mentioned here that the dissolution of the Assemblies in West Bengal and Punjab, by the Governors under article 174 (2) (b) without getting the budget passed, was not constitutionally proper and as a result thereof the President's rule in Punjab was imposed just two days after the dissolution of the Assembly[25] and in West Bengal just a day[26] after. The proper course of action for the Governor in Punjab and West Bengal would have been to reject the advice for the dissolution of the Assembly and to ask the Chief Minister either to resign or to face the Assembly and get the budget passed. If the Chief Ministers would have resigned, the Governors could have either installed an alternative Government as was done in Punjab in November 1967[27] and in Madhya Pradesh in March 1969[28] or could have recommended the imposition of the President's rule alongwith the suspension[29] or dissolution[30] of the Assembly.

The Governor of Punjab accepted the advice of the Chief Minister knowing fully well that he had lost the confidence of the House. While justifying his action the Governor recalled that "Punjab earlier also had an experience of a Government formed by defectors from the Akali Dal with the support of the Congress Legislature Party in 1967. Such an arrangement

as I mentioned at that time in my report to you (the President) is fraught with instability as these defectors are drawn together not by any ideological affinity but mainly for personal gains."[31] It seems strange that the Governor of Punjab dissolved the Assembly on the advice of the Chief Minister who had lost the majority so that the game of defections and counter-defections may stop but the Governor of Haryana, in more or less similar circumstances, instead of accepting the advice of Rao Birendra Singh to dissolve the Assembly, when the Chief Minister has a majority, recommended President's rule. Though after three days even in Punjab, the President's rule was imposed but that had to be done as the care-taker Ministry could not stay in office any more because the budget had not been passed. But in Haryana, the Ministry could have stayed in office till February and by then new elections could have been held with the Ministry of Rao Birendra Singh in office. Hence, it seems that the proper course of action for the Governor of Haryana would have been to accept the advice of the Chief Minister to dissolve the Assembly, whereas the Governor of Punjab instead of dissolving the Assembly in haste should have either explored the possibilities of an alternative Ministry or should have recommended the imposition of President's rule. It will not be out of place to mention here that Gurnam Singh was prepared to form an alternative Ministry in Punjab.[32]

It is also interesting to know that when the Governor of Punjab dissolved the Assembly on the recommendation of P.S. Badal, when his majority had become doubtful because of defections in the Akali Dal, his action was severely criticised both inside and outside Parliament by Congress MPs including Ministers. For instance, Krishan Kant, a Congress MP, said that "the way he (Governor) has tried to ignore the Assembly which was scheduled to meet tomorrow, is deplorable of the high office of the Governor who is supposed to be protector of the Constitution. He should have first sent his report to the President under article 356 and waited for his advice."[33] In fact this was the first time since Independence that the ruling party has virtually censured a State Governor for having acted in an unconstitutional manner. His action was called improper, unconstitutional and arbitrary.[34] It was alleged that he was in league with the Sant Akali Dal and that is why he has acted in haste. The Minister of State for Home

Affairs K.C. Pant expressed the view in Rajya Sabha that "it would have been better for the Governor of Punjab Dr D.C. Pavate not to have "exposed himself" to criticism in taking the decision to dissolve the Assembly on the advice of the out-going Chief Minister, Mr P. S. Badal."[35] In the light of the criticism, it may, however, be asked as to how far the action of the Governor was improper. By accepting the advice of the Chief Minister to dissolve the Assembly on the spot, without exploring the possibility of an alternative Government, it seems, the Governor acted in haste, particularly when the Assembly was to meet the next day for a trial of strength and nothing would have been lost if he had allowed the Assembly to meet. If he was convinced that the crisis could be resolved only by dissolving the Assembly, he ought to have made a formal recommendation to the President under article 356 after considering the claim of the Opposition for the formation of a Ministry. The action of the Governor was extraordinary because it was the first time when the President was asked to take over the State administration through a decision taken by the Governor. Normally, the Governors take such decisions only after consulting the President. In fact, Dr D.C. Pavate was the first Governor who for the first time dissolved the Assembly before sending a report to the President.[36] While commenting on the action of Governor *The Times of India*, in its editorial commented that :

> "In dissolving the Punjab Assembly the State Governor Dr Pavate, has done the right thing but, unfortunately, in a wrong way. According to his notification, he acted on the advice of the Chief Minister, Mr Parkash Singh Badal, whose resignation he accepted simultaneously. But he should have known that having lost his majority in the Legislature, which was due to meet in less than 24 hours, Mr Badal had neither a legal nor a moral right to advise the Governor on dissolution or any other matter. There is no dearth of precedent on this point. Only the other day, the Bihar Governor Mr D.K. Borooah similarly, rejected a similar advice by Karpoori Thakur in circumstances which were comparable to Sunday's dismal drama at Chandigarh. Nothing would have been lost if instead of acting in haste, Dr Pavate had merely accepted Mr Badal's resignation and ordered an adjournment, rather

than dissolution of the Assembly. This would have given him enough time to examine Mr. Gurnam Singh's tenuous claim to the right to form a Ministry and recommend to the Centre on his own, that a fresh election, preceded by a spell of President's rule would be the best way out of the latest crisis in Punjab murky politics."[37]

It is strange that the Congress MPs and Ministers criticised the Governor of Punjab for dissolving the Assembly on the recommendation of the Chief Minister whose majority was doubtful but there was no such criticism against S. S. Dhawan, the Governor of West Bengal when he dissolved the Assembly on the advice of Ajoy Mukherjee, whose majority was equally doubtful. Like Punjab, the Assembly was dissolved three days before the beginning of the budget session,[38] under article 174 (2) (b). In West Bengal too, the Assembly was dissolved first and then the imposition of the President's rule was recommended. Hence, in all respects there were complete similarities in the situation of Punjab and West Bengal except that in Punjab the Chief Minister had resigned and the Congress party was keen to instal an alternative Government of Gurnam Singh whereas in West Bengal the Chief Minister had not resigned and it was one of the coalition partners and hence did not want that an alternative Ministry CPI(M) should be installed. But the action of the Governor of West Bengal was criticised by CPI (M). Its leaders accused him of being guided by "the political interests of the ruling group. They have charged the Governor with deliberately obstructing accession to power by the CPI (M) led front."[39] In fact dissolution in West Bengal was more objectionable than the dissolution of the Assembly in Punjab because in West Bengal the elections were held only in March 1971 that is just three months before whereas in Punjab they were held more than three years ago. Besides this in West Bengal Ajoy Mukherjee was appointed as Chief Minister by ignoring the claim of Jyoti Basu whose united Left Front was the largest in the Assembly having 123 seats and the Chief Minister had not proved his majority in the Assembly even once. Hence, the opposition should have been given a chance before dissolving the Assembly on the recommendation of the Chief Minister who was in office just for 86 days.

DISSOLUTION WHEN THE CHIEF MINISTER HAS LOST THE CONFIDENCE OF THE HOUSE

Whenever the Chief Minister loses the confidence of the Assembly,[40] whether the Assembly will be dissolved on his recommendation or not depends upon the Governor and there is no uniform practice in this respect. For instance, in Travancore-Cochin, after the general elections of 1952 the Congress party with a following of 44 members out of 118, formed the Ministry, which was ousted on September 23, 1953.[41] On the basis of the advice of the out-going Chief Minister, the Raj Pramukh dissolved the Assembly.[42] But the same Raj Pramukh, in that very State, refused dissolution to Pattom Thanu Pillai, the PSP Chief Minister, when a vote of no-confidence was passed against his Ministry in February 1955, and installed P. Govinda Menon as the Chief Minister.[43] This too was a minority Government because PSP had a strength of 19 in a House of 118. Similarly, when a vote of no-confidence was passed against the Congress Government in Andhra on November 6, 1954, on the issue of prohibition, the Chief Minister advised the Governor to dissolve the Assembly, but the Governor instead of granting dissolution, sent for the leaders of other parties and enquired if any one of them was in a position to form the Government. When none of them agreed to do so, the dissolution was granted.[44] Dissolution was also refused to Gurnam Singh in Punjab in 1967,[45] to Charan Singh in UP in 1968,[46] to Raja Naresh Chandra Singh of Sarangarh in Madhya Pradesh in 1969,[47] to Singh Deo in Orissa in 1971[48] and to Hitendra Desai in Gujarat in 1971.[49] The Governors of these States made efforts to instal alternative Ministries and in fact, the Governors of Punjab and Madhya Pradesh succeeded in doing so.[50] However, in UP, Gujarat and Orissa the President's rule was imposed on the recommendation of the Governors and the Assemblies were dissolved under article 356. In UP, however, the Assembly was kept in a state of suspended animation before it was actually dissolved.

But it seems that it would be better if the Governor instead of getting the Assembly dissolved under article 356, dissolves it under article 174 (2) (b) on the advice of the Chief Minister, even if he has been defeated on the floor of the House or has a doubtful majority in case, if he is convinced that dissolution is the only solution of the political problem in the State, provided that there

is sufficient time for holding the elections before the passing of the next budget. The Assembly should ordinarily be dissolved under article 356 if the Ministry resigns without passing the budget or if the Assembly has been kept in a state of suspended animation for sometime.

REASONS FOR ACCEPTING OR REJECTING THE ADVICE TO DISSOLVE THE ASSEMBLY

It will not be out of place to mention that some of the Governors have given interesting reasons for accepting or rejecting the advice of the Chief Minister to dissolve the Assembly. For instance, K.C. Reddy, the Governor of Madhya Pradesh, while rejecting the advice of Raja Naresh Chandra Singh of Sarangarh to dissolve the Assembly, said that "in assessing the present situation in Madhya Pradesh one has necessarily to remember that in the last general election Congress had returned as a majority party. The SVD had come to power not on being elected to the Assembly as a party but through large scale defections. For this, he said, it is clear that the question of an appeal to the electorate which alone is a justification for demanding dissolution of the Assembly could not be put forward by the SVD with any effect."[51] The implication of this statement is that if a particular party comes to power through elections and if subsequently there are some defections from this party, the Assembly may be dissolved if its leader so advises. This view has been upheld by the Committee of the Governors which said that "in the case of a Chief Minister leading a single party Government which has been returned by the electorate in absolute majority, if the ruling party loses its majority because of defections by a few members, and the Chief Minister recommends dissolution so as to enable him to make fresh appeal to the electorate, the Governor may grant dissolution. The mere fact that a few members of the party have defected does not necessarily prove that the party has lost the confidence of the electorate."[52]

This seems to be a sound constitutional suggestion and should be followed automatically because the legislators will be more careful in crossing the floor if they know that the Assembly would be dissolved on the advice of the Chief Minister.[53] This principle may not only be followed where there is a one party Government when it has a clear cut majority in the Assembly but also where

there is a coalition Government, provided that the various partners to the coalition had formed an alliance before the elections. If, on the other hand, the coalition has been formed after the election, the Governor may not dissolve the Assembly on the advice of a Chief Minister if he has a doubtful majority provided alternative Ministry is possible.

The Governor of Orissa, while rejecting the advice of Singh Deo to dissolve the Assembly, however, said that the out-going Chief Minister had not secured the approval of the Cabinet before hand, for this advice.[54] It means the advice to dissolve the Assembly should be that of the Cabinet and not that of the Chief Minister.[55]

In England, however, according to Sir Winston Churchill, "the right of recommending dissolution to the Crown rests solely with the Prime Minister."[56] But Professor Laski is of the view that a Prime Minister can abuse the right to advise a dissolution for personal ends. He, therefore, suggested that "its operation cannot now safely remain the sole prerogative of the Prime Minister. He must share its exercise at least with the Cabinet...A decision to resign or to dissolve ought at the least to be a Cabinet decision if collective responsibility is to be reasonably safeguarded against the possible errors of its leader."[57]

In Gujarat the Governor did not accept Hitendra Desai's plea for dissolution and a mid-term poll, with Desai as a care-taker Chief Minister during the intervening period, firstly, because Desai's majority was in doubt and so his advice could not be accepted. Secondly, the Governor in a letter to the Chief Minister said: "under the Constitution, an Assembly should be dissolved only if it is possible to seek a fresh mandate from the people very soon after dissolution. As you are aware, the Election Commission has announced that fresh elections now could be arranged only after the monsoon in October-November. It will, therefore, not be desirable to administer the State through a "care-taker" Government for such a long time. The third major reason was that the state budget had not been passed and it had to go to Parliament for its passages in which case it would have been incongruous for Mr Desai to continue as the Head of a care-taker administration.[58] The Governor, therefore, commended the take over of administration by President under article 356 of the Constitution." It seems the reasons given by the Governor for rejecting the advice of dissolution

tion are quite sound but what about the Governors of Punjab, West Bengal and Bihar. In Punjab, the Governor dissolved the Assembly under article 174 (2) (b) on June 13, 1971, just one day before the beginning of the budget session and in West Bengal the Assembly was dissolved on June 25, 1971 just three days before the beginning of the budget session on the advice of the Chief Ministers whose majority had become doubtful like that of Hitendra Desai. In Bihar, D.K. Borooah dissolved the Assembly under article 174 (2) (b) on the recommendation of Bhola Paswan.[59] He retained the Chief Minister and the Deputy Chief Minister as a care-taker Government.[60] The Chief Minister had a doubtful majority and even as a care-taker Chief Minister could not stay in office beyond March 31, 1972, without getting the budget passed. Because of this reason, President's rule had to be imposed on January 9, 1972.[61] It will not be out of place to mention here that in Travancore Cochin, the Ministry of Mr John is said to have remained as a care-taker Ministry for more than six months after getting the Assembly dissolved.[62]

STATUS OF THE MINISTRY AFTER DISSOLUTION

It may also be asked here as to what is the status of a Ministry when the Assembly has been dissolved under article 174 (2) (b)? Will the Ministry be known by the name of a care-taker Ministry or will it be known by any other name? After dissolving the Assembly under article 174 (2) (b), the Governor of Haryana said that "it would be wrong to call it a care-taker Government. There is no provision for a care-taker Government in the Constitution. Normally this term is used only for a Government which has resigned and which is asked by the Governor to carry on till alternative arrangements are made. In this case no Minister has resigned. The Government had full authority, though in normal circumstances such a Government does not bring forward any controversial piece of legislation through ordinances. There is of course no legal bar but it is not desirable to do so."[63] But how far will it be constitutional on the part of the Ministry to get the Assembly dissolved under article 174 (2) (b) without submitting its own resignation? As was done in Haryana in December 1970 and in Tamil Nadu in January 1971. Will it not be a violation of article 164 (2) of the Constitution which says that the Council of Ministers will be collectively responsible to the Legislative

X

The Right of the Governor to Address and Send Messages

Under article 176 (1) of the Constitution, "at the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council both Houses assembled together and inform the Legislature of the causes of its summons.

(2) provision shall be made by the rules regulating the procedure of the House for the allotment of time for discussion of the matters referred to in such address."

Here it should be noted that before the passing of the Constitution (First Amendment) Act, 1951[1] "at the commencement of every session" the Governor was to "address the Legislative Assembly or, in the case of a State having Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons." But, after the Constitution (First Amendment) Act the Governor is to address both the Houses of the State Legislature assembled together if there is a Legislative Council and if there is no Legislative Council, then he is to address the Legislative Assembly at the commencement of the first session after each general election and at the commencement of the first session each year (not at the commencement of every session).

WHEN DOES THE SESSION COMMENCE?

But what does the expression "commencement of the session" mean? Does it commence when the members are summoned by the Secretary of the Assembly (under the direction of the Governor) to take oath, or the moment, the Governor starts reading his

address or after the Governor has read his address or when the Governor's address is laid on the table of the House for discussion?

Whether the session begins when the members are summoned by the Secretary of the Assembly for taking oath or not came up for hearing before the Orissa High Court in the case of Sardhakar Vs. Orissa Legislative Assembly.[2] In this case, the Secretary of the Assembly, under the direction of the Governor of Orissa, summoned the first sitting of the Assembly from March 4, 1952, after the general election. A notice was issued by the Secretary of the Assembly forwarding a copy of the Calendar of the meetings for "the first session of the Orissa Legislative Assembly commencing from 4.3.1952."[3] The Calendar of meetings sent with this notice showed that "the 4th and 5th March had been fixed for the administration of oath to the members, the 6th March for the election of the Speaker and the 7th March for the address of His Excellency the Governor to be followed by a motion that a respectful address be presented to His Excellency in reply to his speech, expressing thanks of the Assembly for the speech delivered by him."[4] In this case it was contended that the first session of the Assembly commenced on March 4, 1952 and not on March 7, 1952, the day the Governor was to address the Assembly. In support of this contention reliance was placed by the petitioners on the language used by the Secretary of the Orissa Legislative Assembly in the notice issued by him wherein he said that a copy of the calendar of meeting for the first session of the Orissa Legislative Assembly "commencing from the 4th March" is sent to members. The petitioners further contended that since the session had already commenced on March 4, 1952, hence, the address of the Governor on 7th March cannot be said to be one given at the commencement of the session of the Assembly as provided for in article 176 (1) of the Constitution and hence, it was a violation of the Constitution because under Article 176 (1) it is mandatory on the part of the Governor to address it.[5] Here it may be mentioned that if article 176 (1) is violated the proceedings of the Legislature would be illegal and invalid.[6] It is, however, strange that Ajoy Mukherjee and Jyoti Basu, after the appointment of the Ministry of P.C. Ghosh requested the Governor of West Bengal not to address the first session of the Legislature in February 1968.[7]

Though there seems to be a force in the arguments of the petitioners particularly when we take into account the election of the Speaker because unless the House meets formally, that is unless it is in session, it cannot legally elect the Speaker and Narasimhan J. agrees with this view when he says that "the difficulty arises mainly because the election of the Speaker of the Assembly under article 178 is a part of the business of the Assembly and in one sense may be said to take place after the commencement of the session, such commencement having taken place immediately after swearing in of members under article 188."[8] He, however, further said that he would not "express any opinion on this point unless fully argued."[9] This view is also supported by H.N. Kaul and S.L. Shakdher.[10]

It should, however, be noted that according to May's *Parliamentary Practice*, "When a new Parliament is summoned, the members take their oath, then the Speaker is elected, who, in turn takes the oath, and then the King opens the Parliament by a speech from the throne."[11]

The following passage at page 273 of the May's *Parliamentary Practice* (14th edition) makes the position clear :

> "When the greater part of the members of both Houses are sworn, the preliminaries peculiar to first session are concluded and Parliament is ready to hear the King's speech and to proceed with the initial business of the session."

Since the very same practice has been "followed in India both in the Constitution as well as in the Rules of Business framed by the Speaker of the Orissa Legislative Assembly under the Constitution (the Governor taking the place of the King of England) no member elected to an Assembly can take his seat except after taking the oath of allegiance, nor can the Legislature function without a Speaker duly being elected. After the Assembly is so constituted the Governor addresses the Assembly."[12]

Since there are certain preliminary formalities including the taking of an oath by the members and the election of the Speaker which must be performed before the commencement of the first session after each general election, hence Panigrahi J. observed that "to my mind there is nothing in the language of Cl. (1) of article 176 which purports the contention raised on behalf of the petitioner that the first session of the Orissa Legislative Assembly

commenced from the 4th March, 1952 on which date the newly elected members were summoned to meet to take oaths. I am accordingly of the opinion that article 176 has not been violated and that the order of business fixed for the Assembly on the 7th and 8th of March, does not constitute an infringement of any provision of the Constitution. The rules of the business of the Assembly warrant the procedure and Parliamentary practice justifies it."[13] This judgement is supported by R 3 of the Rules framed by the West Bengal Legislative Assembly for the conduct of its business. It lays down clearly that :

> "in the case of a session after dissolution on the first sitting of the Assembly, after the election of the Speaker. the Governor shall address the Assembly as required under article 176 of the Constitution."[14]

Hence, according to the judgement of the Orissa High Court the session does not "commence" when the Secretary of the Assembly, under the direction of the Governor, summons the members for taking oath and for electing the Speaker.

If the session does not commence when the members are summoned to take oath or to elect the Speaker, then does it commence when the Governor starts reading the address ? According to Panigrahi, Judge of the Orissa High Court, the session "commences", the moment the Governor starts reading his address. According to him the use of the expression "commencement of every session" appears to be deliberate because "it is only at this stage that the session can be said to commence beginning with the address of the Governor under article 176 (1). It may also be noted that the 'first meeting' of the Assembly referred to in article 172 commences from this date and the duration of five years is to be counted from this meeting."[15] But it is surprising to note that the above mentioned learned Judge in the same judgement contradicts this point of view when he says that "the Assembly is then given the opportunity to discuss the address and express its opinion and then proceed to business and *it is only at this stage that the Assembly can be said to meet in session.*"[16] The implication of this expression is that the session commences not when the Governor starts reading the address but only when the Assembly discusses the address of the Governor and hence there is a contradiction in the Judgement. Though it

seems that the later observation is more logical because if the contention, that the session commences the moment the Governor starts reading the address, is accepted, then it would mean that the Governor takes the place of the Speaker as a Presiding Officer and the Constitution it seems does not provide for such an arrangement.

This is also the view of the Law Ministry. "When the Governor addresses the State Legislature under article 176, the Law Ministry says, he functions as an important organ of the Legislature. There is no sitting of the Legislative Assembly at that stage as the sitting begins only after the address of the Governor is over and the regular business of the House is taken up."[17] D.D. Basu agrees with this view.[18] This is also the opinion of Sri Prakasa,[19] who has been Governor in three States.

This view has been consistently held since the very inception of Legislature at the Centre on September 16, 1936. With reference to a question by Sri Prakasa as to whether the speech delivered by the Governor-General to the Legislature was a part of the Assembly Proceedings, Mr Speaker, Abdur Rahim explained the position as follows : "As regards this point, I want to make the position quite clear. At least one of my predecessors in office (Sir Frederick Whyte) was distinctly of the opinion that when the Governor-General addresses the Members of Assembly or of the Assembly and the Council of State together under section 63 (B) (3), that is not a meeting of the Assembly or a 'joint sitting' of the two Chambers, and that a meeting of the Assembly is only duly constituted when President has taken Chair."[20]

Even the present practice supports this contention and the address delivered by the Governor either to both the Houses assembled together or to the Legislative Assembly does not automatically become a part of the proceedings of the Assembly. The copy of the address has to be laid on the table of the House by the Speaker. For instance, Rule 16 (2) of the Rules of Procedure of the West Bengal Legislative Assembly specifically states that after the address, the Speaker shall report "that the Governor has been pleased to make a speech."[21] But if the problem is examined a little further then it will be found that there is one difficulty in accepting this point of view, that is, if the Speaker does not lay the address of the Governor on the table of the House, will the session not commence ? In other words the Speaker

will be in a position to prevent the commencement of the session by not laying the address of the Governor on the table of the Assembly.[22]

It is just possible that some of the constitutional experts may still argue that the session of the Assembly commences the moment the Governor starts reading his address. If this contention is accepted, then its logical corollary would be that the members will have the right to ask questions from the Governor. However, the members have no such right and the Rajasthan High Court has held that "according to the scheme of the Constitution, therefore, the other business in the Assembly including putting of questions or the making of any speech by a member can only follow and not precede, an address by the Governor. We are fortified in this view by the Division Bench case of the Orissa High Court reported as Sardhakar Supakar Vs. Speaker, Orissa Legislative Assembly."[23]

Hence, it can be concluded that the session of the State Legislature commences when the Governor has read his address. By implication it means that the session of the State Legislature cannot commence unless the Governor has read his address. This view has been supported by the Rajasthan High Court. It has decided that "in the absence of address by the Governor, the proceedings in the House cannot be taken to have been validly commenced."[24]

But if this contention is accepted then it would mean that both the session of the State Legislature must be addressed by the Governor and hence, the Constitution First Amendment Act of June 18, 1951, which deleted the expression "at the commencement of *every session*" and substituted in its place "at the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session each year" becomes redundant because according to the above quoted judgement of the Orissa and Rajasthan High Courts, a session cannot commence without the Governor's address. But under article 176 (1) the Governor is not bound to address both the sessions every year. According to Panigrahi Judge, under article 176, at the commencement of the first session after each General Election and at the commencement of the first session each year "the Governor has no option but to address the Assembly and inform the members of the causes of its summons."[25] By

implications it means that the Governor may or may not address the other sessions, and the Constitution First Amendment Act of 1951 supports this contention. Though, it seems that either the contention that the session commences only when the Governor's address is placed on the table of the House, is wrong or both the sessions of every year will have to be addressed by the Governor and the Constitution First Amendment Act of 1951 is redundant. But this is not so because it is first session after the elections that commences with the Governor's address. The sessions other than the first session every year and the first session after the elections can commence without the Governor's address. For instance, in UP in March 1970 the budget session was started without Governor's address and when the Opposition challenged it on the grounds of constitutional requirement, A.G. Kher, the Speaker held that "the present session was not the first session of the new year (1973). It was, in fact, in continuance of the second session of the last year (1972) as had been mentioned in the agenda. A session meant the period from the date on which it was summoned till the day of its prorogation. In the present case, the second session of 1972 had not been prorogued and therefore, there was no question of the present session being the first session of the year. Thus the Governor's address was not necessary for the present session. The Speaker also said that both in 1959 and 1960 the budget session of this House opened without the Governor's address. It was delivered only in July."[26]

Here it should also be noted that many a times the Governors have been asked to read the address either in the regional language of the State or in the mother-tongue of the Governor instead of English. For example, the Governor of Orissa, Shaukat Ullah Shah Ansari was asked to read his address either in Hindi, or in Oriya instead of English.[27] Similarly in Punjab in 1964[28] in Andhra in 1968[29] in Maharashtra[30] in 1968 the Governors were asked to read their addresses in Indian Languages instead of English. Similarly, when V.V. Giri was the Governor of UP. he was asked to read his address either in Hindi or in Telugu.[31] In this respect, it should, however, be remembered that once at the Centre, the Hindi version of the President's address was read by the Vice-President.[32] It will not be out of place to mention here that "exception was taken to the reading out of the Hindi translation of the President's address to the joint sitting of the

two Houses by his Secretary who was described as a stranger. In Lok Sabha, Madhu Limaye (SSP) pointed out that the Constitution laid down that only the President or in his absence the Vice-President could address the Parliament. A similar view was expressed in Rajya Sabha by members of the Opposition Congress, the Jana Sangh and the SSP. Madhu Limaye argued that if the President could not address Parliament in Hindi, he should have delivered it in his mother-tongue. The Speaker, Mr G.S. Dhillon was not sure if he could "direct" the President to read his address in a particular language."[33] Even in U.P. when the Opposition MLAs snatched away the Governor's address on March 19, 1974 it was read out by Virendra Swarup, the Chairman of Vidhan Parishad.[34]

GOVERNOR AS A PRESIDING OFFICER

When the Governor addresses both Houses of State Legislature assembled together or the Legislative Assembly (if there is no Legislative Council) under article 176 (1) of the Constitution, then question arises as to who presides over the meeting. Is it the Speaker who presides over the meeting or the Governor? According to one school of thought, it is the Speaker, but according to the other school it is the Governor who presides over the meeting. The first school of thought bases its argument on the ground that the Speaker being present on the dais, occupies the Chair and hence he presides over the meeting and, therefore, if there is any disturbance during the Governor's address, it is the duty of the Speaker and not that of the Governor to discipline the members. The question as to who presides over the meeting was thoroughly discussed in Parliament because of an ugly incident in the Rajasthan Legislative Assembly on February 26, 1966, when the Governor of Rajasthan entered the Hall to deliver his address under article 176 "Shri Ramanand Aggarwal started addressing the Governor about his having issued certain ordinances and for some other actions of his and he submitted that it would have been better if instead of issuing ordinances, the necessary Bills were introduced in the Assembly itself. At this the Governor is said to have taken offence and he ordered the Sergeant at arms of the Assembly Hall and accordingly, the Sergeant at Arms... forcibly removed 12 members from the Assembly Hall.[35] When "Manik Chand Surana (SSP) pointed out that the Governor had

no right to order the members removal...the Governor was heard to say that he had every right to order their removal.[36] Similarly Dr P.V. Cherian, the Governor of Maharashtra ordered the Marshal to remove J.B. Dhote, a member of the Legislative Assembly, when the latter tried to interrupt the Governor when he was addressing.[37] In the same way, when V.V. Giri as the Governor of UP, was reading his address in English, Raj Narain MLA, demanded that he should read his address either in Hindi or in Telugu (Governor's mother-tongue). The Governor pleaded that nobody would understand if he spoke in Telugu and the Rules of Procedure would not allow it. But Raj Narain was not impressed, then the Governor said, "if you think you are a goonda, you must know I am a bigger goonda. I will not wait for the Marshal to throw you out. Raj Narain sat speechless."[38] Here it should also be remembered that it was in Madras in 1952 that the first incident of this kind took place when Sri Prakasa, the then Governor went to address the Assembly. In the words of Sri Prakasa, "Mr Prakasam spoke rather bitterly both against me as a Governor and Shri C. Rajgopalachari as the Chief Minister. He stood up as I got up to speak. When he started speaking, I sat down. After his speech, he alongwith his followers, walked out of the Chamber. I then made my speech. The matter ended there."[39]

When the Opposition members in Lok Sabha questioned the propriety of the Rajasthan Governor's action in expelling these members of the State Legislative Assembly, Jai Sukh Lal Hathi, the then Minister of State for Home Affairs while defending the action of the Governor said that "the advice had been received as early as 1961 when the Government asked the Law Ministry to examine the question of authority of the Governor as 'Presiding and disciplinary officer'...The Law Ministry's view was that the Governor was incharge of the proceedings of the Assembly and he could take whatever action was necessary to conduct the meeting. This view has been accepted by the Government and I do not find any impropriety on the part of the Governor."[40] This is also the opinion of the Privilege Committee of the Rajasthan Vidhan Sabha when the Governor expelled 12 members, the matter was referred to the Privilege Committee which cleared the Governor, Dr Sampurnanand of a charge of breach of privilege in the House.[41] The Law Ministry also agrees with this view.[42]

But according to the other school of thought, it is not the Governor but the Speaker who presides over the meeting of the House when the Governor addresses it. For example, according to Goel, a member of the privilege Committee of Rajasthan Vidhan Sabha, it is the Speaker who should be considered as a Presiding Officer when the Governor addresses the House. His view was that "the British practice was different from that in India. While the Queen comes to address the House of Commons, the Presiding Officer, the Lord Chancellor, sits in the Clerks Chair. But in India the Speaker sits along with the President or the Governor as the case may be."[43] This contention is supported by an incident which took place in Orissa Legislative Assembly when the Governor of Orissa Shaukat Ullah Shah Ansari started his speech in Oriya and then switched over to English, then some of the members demanded that the Governor should speak either in Hindi or in Oriya. "The Speaker Nanda Kishore Mishra requested the members to refrain from interrupting the Governor's address because the Governor was a new comer to the State and his knowledge of Oriya was limited. When the Speaker gave his ruling that he would not allow anybody to raise the question any more, right communists, one left communist and two SSP members walked out of the House.[44] Similarly all the Opposition members of the Assam Legislative Assembly walked out of the House "in protest against the Speaker not allowing them to move their adjournment motion on the Republic Day disturbances in Gauhati...This happened before the Governor of Assam Mr Vishnu Sahay could begin his address on the opening day of the budget session. The Governor addressed the House after the walk out...The Speaker, then requested the Governor to proceed with his address."[45]

Hence, we find two conflicting positions on this point. But if we consider the matter, a little further, then we will find that it is the Governor and not the Speaker who presides over the meeting because, in the first instance, the session cannot commence without his address and when the Governor addresses the House it is not a formal sitting of the House because it is a special meeting which is summoned to inform it of the causes of its summons.[46]

Secondly, if the contention, that the Speaker presides over the meeting of the House when the Governor addresses it, is accepted, it would mean that the Governor would be under the control of

the Speaker and like other members, he would have to obey the orders of the Speaker. In that case, what would happen if the Speaker does not allow the Governor to address the House.[47] According to the decisions of the Calcutta,[48] Orissa,[49] Mysore[50] and Rajasthan[51] High Courts, without the address of the Governor, session cannot commence and all the proceedings of the Legislature would be null and void.

Thirdly, it would also mean, that the Speaker as a Presiding Officer would then be in a position to expunge certain parts of Governor's speech and that would make the position still more ridiculous. Moreover, wherever there is a bicameral Legislature, both the Speaker and the Chairman of the Legislative Council sit on the dais along with the Governor and then the question would arise as to who presides over the meeting of both the Houses assembled together. Would it be the Speaker or the Chairman? Since there is no provision for a joint sitting of both the Houses of the State Legislature, hence neither the Speaker nor the Chairman presides. Though there is a provision, for a joint sitting of both the Houses of Parliament under article 108 of the Constitution for resolving a deadlock and it has also been provided that at such sitting the Speaker will preside but in that case the President does not address. Hence, when the President addresses both the Houses sitting together under article 87 of the Constitution, it is the President who presides over the meeting because the Speaker presides over the joint sitting only under article 108 of the Constitution and not otherwise.

Therefore, it can be concluded that when the Governor addresses the State Legislature, it is he who presides over the meeting. The Calcutta High Court agrees with this view when it says that "the Legislature of West Bengal consists of the Governor and the Houses. (art. 160). For her to leave a joint assemblage of the two Houses, summoned by herself, in the manner and in the circumstances alleged may not be without significance over her constitutional responsibilities and *her constitutional control* over the Legislature of the State. Generally speaking, if the Governor, in whom the executive power of the state is vested becomes unable to control disturbances inside the Legislature and has either in despair or in displeasure to resort to irregularities in the matter of discharge of constitutional duties and responsibilities, I shudder to think of the fate of the constitutional Government in

this country."[52]. This contention is also supported by the fact that the Governor's address is not a part of the proceedings of the House unless it is placed on the table of the House by the Speaker. Since article 176 (1) is a carbon copy of article 87 (1); hence, the position of the President in this respect seems to be the same as that of the Governor and in order to make the position of the President still more clear "a Committee of the Lok Sabha has recommended a new article for insertion in the Constitution to provide that the President presides when he addresses the Houses of Parliament. It has also suggested that the President should, in consultation with the Chairman of the Rajya Sabha and Speaker of the Lok Sabha, make rules of procedure for maintenance of order, dignity and decorum when he addresses Parliament. The Committee of 15 members was constituted by the Speaker after an SSP member, Ram Deo Singh, obstructed Presidential address on March 23, 1971."[53]

CONTENTS OF THE ADDRESS AND MINISTERIAL ADVICE

It is, of course, a fact that the address of the Governor is ordinarily prepared by the Council of Ministers[54] but there are certain instances where the Governors have made unsuccessful attempts to prepare their own address as was done by V. Vishwanathan, the Governor of Kerala[55] but the coalition Cabinet rejected the draft prepared by the Governor and insisted that the Governor should read the address prepared by the Cabinet which the Governor did. It may, however, be asked in this connection as to what are the constitutional limits within which it has to be prepared by the Cabinet. This question arose in West Bengal in March 1969. In the address of the Governor prepared by the United Front Ministry which was dismissed earlier by the Governor, in November 1967, two paragraphs were included in which the role of the Governor in dismissing the United Front Ministry in 1967 and that of the Central Government for supporting the Governor on this issue was condemned.[56] The Governor "asked the United Front Ministry to delete the portions critical of himself and the Centre from the address prepared by it for delivery by him at the joint session of the State Legislature."[57] The Governor pointed out that these portions do not constitute either a policy or an achievement of the United

Front Ministry, and, therefore, they should be deleted but the United Front Ministry refused to do so and he was requested to deliver the speech as prepared by the Cabinet.[58] To this advice the Governor did not agree and he informed the Chief Minister that he would not read the objectionable paragraphs of the Address.[59] It is significant to note that under article 167 (c) any matter which has been considered by the Council of Ministers cannot be sent back for reconsideration but it seems that the Governor's Address is an exception to this rule, otherwise, once the Address has been approved by the Council of Ministers, it would not have been possible for the Governor to send it back for reconsideration. For the sake of counter arguments, it may however, be said that the Governor's Address is written by the Chief Minister and not by the Council of Ministers. It is, of course, a fact that it is ordinarily written by the Chief Minister but before it is sent to the Governor it is placed before the Council of Ministers as was done in the case of West Bengal.[60]

When the Governor of West Bengal entered the Chamber to address the joint session, all the members of the United Front including the Chief Minister, kept sitting[61] and this was an unprecedented show of disrespect to the Governor. A copy of the printed speech of the Governor as prepared by the Ministry, was placed on the Governor's table,[62] and the copies of the same had already been distributed to the members in advance,[63] which was somewhat unusual because at the Centre the copies of the address are usually distributed to the members after the President has read his address.[64] The Governor, however, set aside the printed speech and asked for his own copy from the ADC.[65] and read the address from it. While reading his address he omitted a portion of his draft containing 535 words.[66] To this, the Chief Minister raised an objection and said: "I must object to this tactic. You must read the speech as prepared by the Council of Ministers." The Governor paid no heed initially and then said: "Ajoy Babu I have already told you that I will not be able to read this portion."[67]

Similarly, V. Viswanathan, the Governor of Kerala also changed the address prepared by the Cabinet.[68]

Now question arises as to how far was it constitutional on the part of the Governor to omit certain portions from the speech prepared by the Ministry? On this point conflicting and

diametrically opposite views have been expressed by imminent Jurists, lawyers, politicians including the members of Parliament and the State Legislatures.

For instance, according to Bhupesh Gupta "there is no proviso which enables the Governor to exercise what he might regard as discretionary powers to tamper with the statement or the address prepared by the Cabinet and given to him to read out... First of all the address is ministerial statement and that is settled in law, settled in Constitution, settled by convention, and settled, certainly, as a well established principle in the British Parliamentary system from which we have borrowed so much. But our borrower, whenever it does not suit him, forgets the creditor."[69] Similarly, P.N. Sapru, former MP and a retired Judge of the Allahabad High Court "held as unconstitutional the action of the West Bengal Governor, Mr Dharam Vira in omitting to read portions of his address to the joint session of the State Legislature prepared by the Cabinet...The Governor's address is the Governments address...and he has no right to interfere with it."[70] This is also the opinion of Dwivedi,[71] Namboodiripad,[72] and H.C. Chatterjee.[73] Morris Jones in his book *Government in Parliament* agrees with this view when he says that "it is therefore, beyond doubt that the Governor cannot alter the speech prepared for him by the Cabinet, if the Cabinet is not willing to incorporate the changes suggested by the Governor."[74] The entire Left Opposition in the Lok Sabha denounced West Bengal Governor Dharam Vira's action in skipping over certain portions of the address prepared by the United Front Government and called it constitutionally untenable and politically fraught with great danger.[75] The view that the Governor's address is a Government address, is also supported on the ground that whenever, the Government is defeated on a motion of thanks to the Governor, it has to resign. For example, the Government of SVD, headed by T.N. Singh was defeated when an Opposition "amendment to the motion of thanks to the Governor was carried by 229 votes to 184, following defection from the Congress by Charan Singh with 16 others in 1972.[76] It may, however, be mentioned here that sometimes in the motion of thanks to the Governor, the Ministry may criticise the Governor himself as was done in West Bengal in 1969, which is quite unusual.[77]

Though it is a Government address, yet persons equally imminent in the field of constitutional law and public life hold the view that there is no constitutional bar against the Governor deciding not to read any part of the prepared address. For instance, "the former Maharashtra Governor Sri Prakasa supported the West Bengal Governor, Mr Dharam Vira's action in skipping two portions of his address while inaugurating the budget session of the State Legislature. Speaking to newsmen he said that the Governor's address had nothing to do with the party politics and was to be regarded as a programme-oriented policy-making statement. Viewing the matter from this angle, he said, Mr Dharam Vira was right in deleting portions of the address that contained critical references to the circumstances in which the United Front Ministry was dismissed in 1967.[78] The Law Minister Mr Govinda Menon also said that "there was no provision that he should read the text prepared by the Cabinet."[79]

He, further said that the Governor "was not merely a mouthpiece of the Council of Ministers. He had also to defend and preserve the Constitution."[80] In his opinion, the Governor has a right to omit certain portions of the address.[81] Asoke Sen, the former Law Minister, Government of India,[82] M.C. Setalvad, the former Attorney-General of India[83] both well known jurists, and Y.B. Chavan, the then Home Minister[84] agreed with this view. According to Dharam Vira, the then Governor of West Bengal, "Parliamentary conventions were not broken by him by skipping certain portions of his address prepared by the State Council of Ministers...at joint session of the Legislature."[85] This is also the opinion of C. Rajagopalachari. He, for instance, has stated that "he was really unable to find any authority—either in the Constitution or in the accepted conventions for the position taken by some that the Governor should read out the entire address prepared by his Council of Ministers to the joint session of both Houses of the State Legislature."[86]

Since, conflicting opinions have been expressed on this point, it therefore, needs a detailed examination from the constitutional point of view. Those who are of the opinion that the Governor cannot omit any part of the speech, base their argument on the British Parliamentary pattern and they say that just as in England the Queen cannot delete any portion of the speech prepared by the Cabinet, similarly in India, both at the Centre and at State level,

the Head of the State cannot deviate from this practice. In England, it is, of course, a fact that there is a convention that the speech from the throne is prepared by the Cabinet but the Queen can make suggestions for the revision of the draft of her address which is to be treated with respectful consideration.[87] For instance, "in 1841 Queen Victoria did not agree with some passages in the address prepared by the Cabinet. Queen Victoria said she would not like to have them. But the Cabinet at that time insisted on it and she had to read out the address."[88] It means that finally, whatever is the decision of the Cabinet in that respect, the Queen reads it. But whatever, she reads, the responsibility is that of the Cabinet because in England there is a maxim that "the Queen can do no wrong." "English Constitutional History was once reduced to memorable rhyming slang by an irreverent wit who scrawled on the portals of the royal bed chamber of Charles II the following lines :

"Here lies our Sovereign Lord The King
Whose words no man relies on;
He never says a foolish thing
Nor ever does a wise one."

To which the King retorted : "Very true, because while my words are my own, my acts are my Ministers." With the passage of time even the words were taken out of the King's mouth by the Ministers.[89]

In India, however, this is not the case because constitutionally the Ministers are not responsible for the advice which they tender to the Head of the State and the question whether any, and if so what, advice was tendered by Ministers to the President[90]/ Governor[91] cannot be inquired into any Court. If on the advice of the Council of Ministers the President violates the Constitution, he may be impeached on that ground.[92] Therefore, if at any time the Council of Ministers prepares an address for the President which involves the violation of the Constitution, the President instead of accepting the advice of the Ministry, would perhaps consult the Supreme Court under article 143 of Constitution.[93] If the advice of the Supreme Court is that the address involves the violation of the Constitution, the President would, in the first instance, ask the Ministry to delete the objectionable part. If the Ministry still insists to retain the objectionable part, the

President would perhaps have no option but to omit it while reading the address.

From this it can be concluded that at the Centre, the President is not bound to read the address prepared by the Cabinet if constitutionally it involves the violatian of his oath which may ultimately lead to his impeachment. The same seems to be the case with the Governor. Uptil now however, whenever there has been a difference of opinion between the Head of the State and the Council of Ministers, in this respect, the former has yielded. For instance, once Chandu Lal Trivedi, the Governor of Andhra, "disagreed with the State Cabinet on the issue of release of political prisoners and levy of certain taxes. Yet he had read out paragraphs in his address to the State Legislature dwelling on these very points."[94] Similarly there was a differencc of opinion between Pt. Nehru and Dr Rajendra Prasad over the inclusion of some reference of the Hindu Code Bill in the President's address to the joint-session of the Parliament. The President then had not departed from his constitutional position and had not omitted the objectionable portion.[95] But in these cases, it should be remembered that the difference of opinion was on policy matters and not on the constitutional propriety or illegality of the contents of the address, involving the violation of the oath or personal humiliation.

But those who cite the conventions of the British Constitution in this respect, they perhaps overlook the fact that all the conventions of the British Constitution are not followed in India. For instance, the power of dissolution is not exercised on the British Parliamentary pattern. There are numerous examples where the Governors have refused to accept the advice of their Chief Ministers in this respect.[96] Even with regard to the power of summoning, the advice of the Council of Ministers does not seem to be binding because in West Bengal the Governor refused to accept the advice of the United Front Ministry in this respect.[97] In that case too, the Governor insisted that the Legislature be summoned by a specific date, indicated by the Governor.[98] When this advice of the Governor was not accepted, the Ministry was sacked and an alternative Ministry was installed.[99] Even with regard to the power to prorogue, whenever the Governor has exercised this power on the advice of the Chief Minister, the conduct of the Governor has been severely criticised in Parliament.

For instance, when the Governor of Madhya Pradesh prorogued the session of Legislature on the advice of Mr D.P. Mishra, the then Chief Minister, his action was described as a "culpable homicide of democracy,"[100] and even Acharya J.B. Kripalani called it as "unconstitutional".[101] Similarly, again in Madhya Pradesh when the Governor prorogued the session of the Legislature for the second time on the advice of the SVD Chief Minister, Govind Narain Singh, his action was described as the "murder of democracy."[102] By implication this means, the Governor should not always act upon the advice of the Chief Minister even in this respect. If the British Parliamentary conventions are not to be followed in respect of summoning, proroguing and dissolution, how can it be followed *in toto* with respect to the contents of the address? This seems to be so because many of the conventions of the British Constitution have been embodied in our Constitution. For example :

> "Article 75 (3), 77 and 78 in express terms specify what are the conventions in U.K. articles 109 (2) and 110 embody the corresponding provisions of the law in England regarding Money Bills. Where required, as in article 105 (2), express provision is made that the powers, privileges and immunities enjoyed by the British Parliament and of the Members and the Committees of the House of the Commons should apply to each House of Parliament and the Members and Committees of each House, till appropriately defined."[103]

It is quite significant to note that while these conventions of United Kingdom have been specifically written in the Indian Constitution, the convention that the Monarch cannot omit any part of the speech from the throne prepared by the Cabinet has not been incorporated. This seems to be deliberate and not an incidental omission, otherwise, like other British Parliamentary practices, this too could have been expressly provided in the Constitution. Not only this, even the proposal to incorporate instructions that the Governor would be bound by the advice of the Ministers was rejected by the Constituent Assembly. This shows that it is perhaps not correct to say that the advice of the Council of Ministers with regard to the contents of the address is binding on the Governor. It will not be out of place to mention here that immediately after the elections in February 1974, the

Triple alliance consisting of the BKD, SSP and Muslim Majlis urged the Governor not to deliver his address as prepared by Bahuguna Government.[104] The Governor's address was in fact, snatched from the Governor in UP Vidhan Sabha on March 19, 1974 and torn to pieces. In such a situation, the Governor may have no alternative but to address them extempore.

CONSTITUTIONAL LIMITATIONS

If the Council of Ministers wants that the Head of the State should read the address prepared by it *in toto*, then it must be prepared within the constitutional limits. For instance, it must inform the Legislature of the causes of its summons[105] which means it has fundamentally to be a policy statement.[106] C. Rajagopalachari, the former Governor-General of India agrees with this view when he says that "the Governor's address is intended to be a statement of policy of the new Ministry. The new Ministry may hold their "own opinions" on what happened before the mid term poll but such opinions are not a legitimate part of the draft they prepare for the Governor's address to the Assembly, nor is he expected to adopt those opinions as his and express them as such in his address .. The portion of the address which formed the subject of dispute in the West Bengal controversy and which the Governor refused to read were all criticism of happenings before the mid term poll. I, therefore, fail to see any plausible justification for the complaint of the West Bengal Ministry or the furore of others over his subject."[107]

This contention has been supported by Calcutta High Court which has held that the address cannot be an idle or ceremonial formality because the Constitution lays down the purpose for the address namely informing "the Legislature of the causes of its summons. The speech is to announce the executive policies and Legislative programme and since the first session every year is also the budget session, the speech is expected to call attention of the members to the requirements of the Government for supplies to carry on the administration."[108] It means basically it should be a policy statement. It will not be out of place to mention here that the Chief Minister of Assam (Chaliha) while expressing a desire to resign on the ground of ill health wanted that his decision to resign be read out by the Governor in his address and hence, it was included. But later on the legal experts whose counsel was

sought in the matter had given the opinion that the Governor could not dwell on issues other than that of an administrative nature in his address. Hence, it was deleted.[109]

It is particularly so in England. For instance, in a book called *Parliamentary Dictionary* which has been written by L.A. Abraham, who was formerly principal clerk of Committees in the House of Commons and Hawtrey, Clerk of the Journals of the House of Commons, the definition of the "Queen's Speech" has been given which is as follows :

> "When the Queen opens Parliament at the beginning of the session she reads a speech which is prepared for her by her Ministers and which sets forth the policy which they intend to pursue and the Legislation which they propose to introduce during the session."[110]

But unfortunately in India, it has not always been so. For example, Shri M.N. Kaul while speaking on this controversy, said that : "The first question that was raised is, what is the scope of the Address? Now, so far as the scope of the address is concerned, constitutional provisions have been cited and Government, in the other House have relied on those constitutional provisions and argued that so far as the address is concerned it should have referred to the causes of summons and to the programmes. Well, if the Constitution was to be strictly interpreted and if the British precedents were followed, that view was correct. But I happen to know the genesis of this. In 1952 when I was summoned to a meeting in Prime Minister Nehru's room and he asked for precedents, I showed him precedents and as was his custom, he was also, in his own way, setting precedents. He said : 'No, we are not bound. We will set our own precedents. I do not want the Address of the President to be just as laconic as the Queen's Address with a recitation of a string of Legislative programmes [he cited a poem] a sparrow came and picked up a grain and another sparrow came and picked up a grain and so on.' He wanted to widen the scope of it. That is how it started and the practice that the Address should be wider in scope was set in 1952 by Prime Minister Nehru himself and that practice has continued to this day. The latest example is the Address delivered by our revered President on 17th February, 1969. The very first line says :

'It is an appropriate occasion for Government to present a realistic appraisal of the year under review."[111]

In the Governor's address, it seems, it is within the purview of the State Government to criticise even the Central Government in certain respects. If the State is not getting a due share in the developmental plans, it can be criticised. For instance, while inaugurating the budget session of the State Legislature, Vishwanathan, the Governor of Kerala "criticised the Centre for neglecting the State in matters of location of Central Sector projects and allocation of financial resources."[112] The other aspects of the Centre-State relationship, such as administrative, financial and Legislative may also be critically mentioned to some extent. But there are certain aspects of Centre-State relationship which perhaps, constitutionally cannot be discussed in the State Legislature. For instance, in the administrative field if any instruction given by the Centre to the State under article 257 is not carried out, the failure of the constitutional machinery may be declared under article 356, which may result in the imposition of the President's rule. After elections, if the same political party comes into power again and if it decides to mention this fact in the Governor's address by calling it as undemocratic, constitutionally improper and legally unwarranted, the Governor would have perhaps no alternative except to omit it, if the Ministry does not agree for its deletion. Similarly, imposition of the President's rule under article 356, either on the basis of a report of the Governor or otherwise or withholding of an assent by the President from any Bill reserved by the Governor for his consideration under article 201, if called constitutionally improper and arbitrary. in the Governor's address, prepared by the Ministry, the Governor would be compelled to delete such a paragraph in spite of the advice of the Ministry to the contrary. In the same way if the Cabinet wants to criticise the Central Government either for the appointment of a Governor, who might have been appointed against the expressed wishes of the State Cabinet as happened in Bihar in the case of Nityanand Kanungo or for not accepting the request of the State Ministry for the recall of the Governor in office immediately as happened in West Bengal in the case of Dharam Vira, the Governor would not read it because it might involve him personally.

In this particular case the imposition of the President's rule in West Bengal was severely criticised. For instance, in the address it was mentioned that "the minority Government...could not stay in power for more than three months. Although the demand of the people was that the popular United Front Government should be restored to power, this was ignored by the Central Government authorities and President's rule was imposed on this State against the clear wishes of the people, expressed so emphatically through their democratic movements."[113] It is significant to note here that in West Bengal the President's rule was imposed on the recommendation of the Governor.[114] When this was the case, how could the Governor be expected to criticise the Central Government for the action which was taken on his recommendations. Whether there was a sufficient justification for this or not is a different matter. The criticism of the Central Government in this case would have, in fact, amounted to a "self condemnation" for the advice given by the Governor to the President under article 356. While writing a report under article 356, the Governor exercises his individual judgement and if his assessment of the situation is different from that of the Council of Ministers, it seems it cannot be constitutionally questioned in the Assembly. It can, of course, be discussed in Parliament.

The Governor's address should not also make any reference to matters which cannot be constitutionally discussed in the State Legislature. For instance, no discussion can take place in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties,"[115] and if the Council of Ministers would have included some derogatory remarks against Justice B.C. Mitra, who declared that the dismissal of the Ministry of Ajoy Mukherjee was constitutionally valid,[116] it would not have been possible for the Governor to read it. It is, of course, a fact that sometimes there can be a comment even on the decisions of the Supreme Court and the legislators can express a different opinion as it happened in Lok Sabha[117] when there was a debate on the Bill introduced by Nath Pai (The judgement of the Supreme Court on the Golak Nath's case came in for strong criticism). Now question arises, whether the para with regard to the judiciary, which the Governor had omitted was a reflection on the conduct of the Judge or it was merely the expression of a different opinion. To call the dismissal

of the United Front Government as "Peremptory and unconstitutional" in spite of the decision of the High Court to the contrary perhaps cannot be considered merely the expression of a different opinion. It seems that it was something more than that. It was nothing but the condemnation of the judgement of the High Court. According to A.K. Sen, reading of this paragraph would have constituted "a contempt of the High Court of Calcutta, which had upheld the Governor's action in dismissing the earlier United Front Ministry and installing the minority Government of Dr P.C. Ghosh in office."[118] Here it should also be remembered that the Governor had to face a situation which was unusual and unprecedented. The Governor was asked to read out passages which were *sub judice* because the appeal was pending in Supreme Court against the decision of the West Bengal High Court.[119] Whatever, might be the opinion of the Ministry, the Governor as a Head of the State was perhaps not bound to read a message which casts a reflection on the High Court simply because the Ministry wanted it. In fact, under the second proviso of article 200, the Governor has a constitutional obligation to protect the position of the High Court. Since the "paragraph deleted by the Governor contained remarks which questioned a judicial decision,"[120] therefore, there was perhaps no alternative with the Governor except to omit it.

The Governor's address should be such which is in accordance with the oath which the Governor takes under article 159 of the Constitution. Under this article the Governor swears in the name of God or solemnly affirms that he will faithfully execute the office of the Governor (or discharge the functions of the Governor) and will to the best of his ability—preserve, protect and defend the Constitution and the law and will devote himself to the service and well being of the people. If the Council of Ministers includes anything in the Governor's address, which directly or indirectly violates this oath of office, it will be "improper on the part of the Governor to read it".[121] Just as in the Centre the President can be impeached under article 61 of the Constitution if he violates the oath which he takes under article 60, similarly, for the violation of the oath, the Governor may also be removed by the President from the office. In this particular case the Council of Ministers tried to force the Governor to condemn himself by reading the following paragraph :-

"You are all aware of the peremptory and unconstitutional manner in which the popularly elected United Front Government was thrown out on the 21st November, 1967, without the sanction of the august body, and the unseemly haste with which a minority Government of defectors was installed in power with the assistance of another minority party in the midst of serious public disapproval of this high handed measure."[122]

The action of the Governor in dismissing the Ministry was called as the usurpation of power "in unashamed defiance of the Constitution",[123] "arbitrary authoritarianism,"[124] "unprincipled tampering with the Constitution,"[125] "deplorable cycle of events,"[126] "questionable manoeuvres aimed at overriding the wishes of the people."[127] How could the Governor be expected to come forward and say that what he did (in dismissing the first United Front Government) was wrong particularly after it has been upheld by the Calcutta High Court. In fact, by putting these words in the mouth of the Governor, the Ministry wanted to interpret the Constitution as it liked and thereby it rejected, indirectly of course, the decision of the Calcutta High Court. The Governor was not supposed to do that because, besides the contempt of Court, violation of his oath of office, it also amounted to "self condemnation"[128] and, therefore, the Governor it seems was perhaps justified in omitting these paragraphs. Besides self condemnation and the contempt of the Court, the Governor seems to have been guided by article 176 of the Constitution which specifically provides that "the Governor while inaugurating the joint-session should inform the Legislators of the causes of its summon." It is stated that the Governor's dismissal of the United Front Ministry in 1967 cannot be the cause of the summon.

It should not also criticise the Governor for the exercise of his discretionary powers. There are certain powers which are to be exercised by the Governor either in his discretion or by exercising his individual judgement. For instance, when the Governor of a State is appointed as the administrator of a Union Territory, he shall exercise his functions—independently of the Council of Ministers.[129] In other cases it has of course not been mentioned that those powers are to be exercised independently of the Council of Ministers, however, by implication this inference can be drawn. For instance, with regard to the power of appointing a Chief

Minister, withdrawing of the pleasure under article 164 and dissolution of the Assembly under article 174 (2) (b), the Governor exercises either his discretion or his individual judgement. About the power of appointing a Chief Minister and withdrawing of the pleasure from the Council of Ministers, there is already a decision of the Calcutta High Court which says that "the power to appoint the Chief Minister...and the "pleasure" contemplated in article 164 (1) were conferred upon the Governor exclusively. This right was absolute (and)...could not be questioned."[130] In this connection it should also be noted that "if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of any thing done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion."[131]

If the Governor exercises these powers either in his discretion or by exercising his individual judgement, no derogatory remarks can be made in the Governor's Address because it is his constitutional right to exercise them in the manner he thinks fit. Should the Governor be condemned simply because he could not accept the claim of certain groups to form the Ministry or he rejected the advice of the outgoing Ministry with regard to the dissolution of the Assembly? It seems that if any Council of Ministers does so, the Governor would be within his Constitutional right to omit such a critical reference and it would be the violation of the Constitution.

This shows that if the address prepared by the Council of Ministers is not within the limits of constitutional propriety, the Governor will be justified in omitting the objectionable part. But the problem is how to find out whether the contents of the address are within the limits of constitutional propriety or not. Though it is very difficult to find out an exact measurement of the constitutional propriety or impropriety, yet certain guiding principles may perhaps still be found out and one of such principles is that if incidentally, just before the opening of the session the Governor falls ill, then the Chief Justice of the High Court may be asked by the President under article 160 to perform this duty. If the contents of the address are such which the Chief Justice is in a position to read, then it can be considered within limits of

constitutional propriety. If, for instance, in the Governor's address the Council of Ministers makes a demand for the secession of a State or for the impeachment of the President or for the resignation of the Governor of a neighbouring State, the Governor perhaps will have no alternative but to omit it. While supporting this contention P. Govinda Menon, the then Law Minister observed that:

> "It is very easy to say that a Governor is a sort of automation just to do all that the Council of Ministers asks him to do. I would respectfully submit that with respect to certain matters it is not so. For example, please refer to the proviso to article 200. A legislation is a much more solemn act than a speech prepared by the Council of Ministers because legislation is something which is discussed in the House and passed by the House. But the proviso says:
>
> "...the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by Constitution designated to fill.
>
> "Apart from that, is he the person bound simply to ditto, or just to place the seal to whatever the Council of Ministers does? That is not the position."[132]

This contention has also been supported by the Calcutta High Court in Syed Abdul Mansur Habibullah Vs. the Speaker of the West Bengal Legislative Assembly. In this case the High Court has held that "an address may be an oral address or written address. But the reading of article 176 of the Constitution with sub-rules (1) and (2) of the Rules of Procedure, herein before set out, I have little doubt that address by the Governor, under article 176 shall be by delivery of speech, may be by reading out from a prepared text."[133]

In this Judgement, it has been upheld that the address "may be an oral or written," which means that it may not be a written address, and if it is not a written address, then by implication, it cannot be address prepared by the Council of Ministers.

LAYING OF THE GOVERNOR'S ADDRESS ON THE TABLE OF THE HOUSE

But whenever, any objectionable matter is included in the address of the Governor, would it not be better if instead of omitting certain portions, he reads the first few lines and not the whole of it. There are cases where the Governors have read only first few lines and the rest of it has been taken as read after it has been placed on the table of the House. For instance, Mr Dharam Vira could not complete his address due to turmoil in the House but it was taken as read."[134]

His predecessor, Mrs Padmaja Naidu also could not on one occasion proceed beyond "Ladies and Gentlemen" and the Calcutta High Court held that "a part of the speech meant a full speech."[135]

Similarly, when Dr Sampurnanand, the Governor of Rajasthan could not read his address because of disorderly scenes created by the Opposition, he simply read the last paragraph of his address and it was considered "as having been read."[136] In that case, the Speaker of Rajasthan Legislative Assembly Mr Ram Niwas Mirdha, declared that the Governor's presence in the House met the Constitutional requirement under article 176. The Speaker, while rejecting a point of order raised by Hira Bhai (SSP) said that similar situations had arisen earlier also in Rajasthan and the Governor's Address was taken as read even though the Governor did not deliver his address in full."[137] In the light of this decision it may, however, be asked as to how far it is possible for the Governor to fulfil this constitutional obligation by merely laying his address on the table of the House without making any attempt to read it. Since the natural meaning of the term "address" is "to direct one's words to" or "speak directly to" or "to present a formal address (vide Chambers Twentieth Century Dictionary)[138] hence unless the Governor makes an attempt to read the address, the constitutional obligation will not be fulfilled.[139]

No doubt, it seems as if it is not necessary that he should read the whole address because he can fulfil his constitutional obligations under article 176 (1) either by reading a few lines or by laying the address in person on the table of the House.[140] But in that case, since the address as a whole would be taken as read, even this action on the part of the President and the Governors may involve the violation of their oath and hence, there seems to

be no way out except to omit the objectionable portion from the address. For example, in the case of West Bengal, "Assembly Secretary P. Roy said the full text of the address as drawn up by the United Front Cabinet will form part of the proceedings of the House. The omitted portions will be included in the proceedings because Chief Minister Ajoy Mukherjee had told the Governor in the House that he was skipping over portions and protested against it. Mr Roy said the Speaker also referred to the omission while laying a copy of the address on the table of the House. The motion of thanks to the Governor also referred to the omission. He said the address minus the omitted paragraphs (2 and 3) would only be considered as "the speech of the Governor."[141]

But then what about the Governor of Punjab. While Dharam Vira had refused to read out critical portions of the address to the joint-session of the State Legislature, the Governor of Punjab had done precisely the same thing with a flourish and a question arises as to how far was it constitutionally correct for him to read that "the budget session of the Legislative Assembly in March, 1968, constitutes an unfortunate and painful chapter in the history of democracy in the country. Police were brought into the sacred floor of the Punjab State Legislative Assembly and constitutional rights and practices were gravely violated during the so-called passage of the annual budget. Supplementary estimates amounting to Rs. 183,630,690 and amounting to Rs. 2,877,093,070 included in the budget for the year 1968-1969 were declared to have been passed in a matter of minutes. My Government is of the definite view that these violations of sacred principles and practices pose a great threat to democracy. We are determined to have this incident inquired into at the highest level so as to take necessary steps for the future."[142]

So far as the reference to the bringing of the police in the Legislative Assembly and making of the inquiry at the highest level is concerned, it seems to be a reflection on the conduct of the then presiding officer because if at all the police entered the Assembly Chamber, it must have been with the permission of the Presiding Officer. If the present party in power thought that the then Presiding Officer had violated the constitutional rights and practices by permitting them to enter the Assembly Chamber, in the first instance, they should have brought a vote of no-confidence against the then Presiding Officer at that time (the Deputy Speaker

in this case who presided over this meeting after the Speaker has left the Chair). Since the inquiry of the incident, in fact, amounts to an inquiry of the conduct of the then Presiding Officer, there fore, constitutionally it seems that the enquiry could not be held.[143]

Moreover, the expression that the "constitutional rights and practices were gravely violated during the so-called passage of the annual budget" probably refers to the procedure which was followed in the passing of the budget. It should be noted that the constitutional rights and practices could be gravely violated during the passage of the budget only if the procedure had not been properly followed or the procedure which has been followed was of a doubtful constitutional validity. So far as the validity of the procedure is concerned, it has been upheld by the Supreme Court and to doubt its validity after the judgement of the Supreme Court, means the non-acceptance of this judicial pronouncement. This means a reflection on the Supreme Court and hence, it involves the contempt of the Court. Moreover, if the procedure had not been followed properly by the Presiding Officer, the remedy was not with the Courts,[144] but with the Legislature under article 179 (c), that is, his removal and the United Front was free to adopt this course of action at that time and there could not be any inquiry subsequently.

It appears that the address of Punjab Governor not only violated article 212 (2) of the Constitution but also by casting a reflection on the Supreme Court, it perhaps involved the contempt of the Court. The Governor, as a Head of the State, should not have read this part of the address and by reading, it appears he has violated his oath of office. This, presumably has been done by him because he did not want to face the music which the Governor of West Bengal had to face. However, from the constitutional point of view, this action of the Punjab Governor seems to be undefendable.[145]

When the subject came up in the Upper House, its Chairman Mr D.D. Khanna observed: "The Governor has condemned himself."[146]

Hence, it can be concluded that it is perhaps not possible for the Governor to "read out in his address whatever the Council of Ministers asks him to do. In this connection it will be very pertinent to remember that the Governor has three functions. The first is, he is an agent of the President of India. Secondly, he is

the constitutional head of the State, and thirdly, he has discretionary powers to use his discretion and solve when a problem arises. So when we try to judge and assess any action of the Governor, we have to see and assess it in the context of these things. We cannot expect the Governor to read anything which in any way casts any aspersions against the President of India... The Governor has to function within certain limitations. He has to use his discretion in such a way that the position of the Governor as such does not come into disrepute being constitutional head of the State, that his position as a representative of the President of India is not in any way impaired."[147] It has also been rightly observed by M.N. Kaul that "the machinery of the Address cannot be used to compel the Governor to condemn himself out of his own mouth."[148]

NOTES

1. It was passed on June 18, 1951.
2. Sardhakar Vs. Orissa Legislative Assembly, *AIR*, 1952, Orissa, 235.
3. *ibid.*
4. *ibid.*
5. "The consequences of non-delivery of such an address is that the members of the Legislative remain uninformed and not knowing the administrative policies and programmes may be considerably hampered in their Legislative Debates and budgetary criticism. Article 176, therefore, casts upon the Governor the constitutional duty of delivering a special address at the annual opening session of the Legislature and provisions for such address in article 176, should not be interpreted as merely directory." Syed Abdul V.W.B. Legislative Assembly *AIR*, 1966, Calcutta, 369.
6. According to B.N. Bannerjee J. of Calcutta High Court :
   (a) "In my opinion, the Legislature in this country cannot ordinarily be said to have met until the mandatory preliminaries under Article 176 have been gone through. This is also the view of the Orissa High Court expressed in Saradhakar Vs. Speaker, Orissa Legislative Assembly, *AIR*, 1952, Orissa 234. If the Legislature has not met that is to say legally assembled for the purpose of transacting business, no business can be transacted and sitting of the Legislature before it has legally met, are invalid sitting. If that was not so, the members might as well themselves meet in the session of the Legislature without being at all summoned by the Governor and pass laws. Articles 174 to 176 prescribe constitutional procedure by which the Legislature

is to meet and to transact business. It cannot otherwise meet, continue to sit and transact Legislative business.
Syed Abdul Vs. W. Bengal Legislative Assembly, *AIR*, 1966, Calcutta, 369.

(b) Mysore High Court also agrees with this view-H. Siddaveerappa Vs. The State of Mysore, *AIR*, 1971, Mysore, 201.

(c) Rajasthan High Court has also expressed the same view when it says that "in the absence of address by the Governor the proceedings in the House cannot be taken to have been validly commenced." Yogendra Nath Vs. State, *AIR*, 1967, Rajasthan, 125.

7. "Shri Ajoy Mukherjee and Shri Jyoti Basu thereafter requested me not to address the Joint Session of the Assembly and the Council on the 14th February as they did not like any unseemly incidents to occur. I told them that I had certain constitutional obligations and they had to be discharged. Merely a danger of incidents could not deter me from discharging my constitutional obligations." Dharam Vira (Governor), *Indian Express*, February 22, 1968, p. 8.
8. Sardhakar Vs. Orissa Legislative Assembly, *AIR*, 1952, Orissa, 235.
9. *ibid.*
10. Kaul H.N. and Shakdher, S.L., "*Practice and Procedure of Parliament*. 1968, pp. 132-33.
11. Sardhakar Vs. Orissa Legislative Assembly *AIR*, 1952, Orissa, 235.
12. *ibid.*
13. *ibid.*
14. The Rules of procedure and business framed by the Orissa Legislative Assembly would indicate a similar procedure. The Secretary first issues summons to each member for a session of the Assembly. Rule 5 says that "When after a General Election, there is a vacancy in the office of the Speaker of the Assembly, the Governor shall fix a date for the election of the Speaker." Then comes the provision for the election of the Deputy Speaker and for the appointment of a panel of Chairman. Under Sub-Division III of the Rules, comes R 10 which provides for the special address of His Excellency the Governor "at the commencement of every session."
15. Sardhakar Vs. Orissa Legislative Assembly, *AIR*, 1952, Orissa, 235.
16. *ibid.*
17. *Tribune*, October 11, 1966.
18. D.D. Basu, *Commentary on the Constitution of India*, 5th ed., Vol. II p. 526.
19. "It should also be remembered, that this particular function, namely opening of the Legislature by the President or the Governor, is not a part of the proceedings of either the Upper or Lower House. It stands apart by itself. Though the speech is printed in the minutes of both the Houses the same is not supposed to form a part of the body of the proceedings of the House." *State Governors in India*, 1966, p. 79.
20. Kaul, H.N. and Shakdher, S.L.: *Practice and Procedure of Parliament* 1968, pp. 132-33.

heard. I say 'possibly' because it does not appear under what circumstances she left, apart from what I have stated above. After the Governor left, *the Speaker laid a copy* of her address on the table of the House as required by the Rule 162 (2) of the Rules of Procedure. The question is whether the provisions of article 176 were substantially complied within the aforesaid circumstances.

Now laying on the table is a well-known device for calling attention of the Legislature. Some statutes provide that subordinate Legislation, namely rules, schemes or orders made under the statute, shall be laid before the Parliament or State Legislatures as the case may be and may require affirmative or negative resolution on such subordinate legislation. In many cases there is no provision for having any resolution at all and the statute is content by merely providing that the subordinate legislation shall be laid on the table of the House concerned. There are other statutes which provide for a formal resolution, Rules of procedure of the West Bengal Legislative Assembly provide for a "respectful address" or resolution on the Governor's Address. Thus laying on the table is a technique for producing awareness of Parliament or Legislatures of States on subordinate Legislation, Governor's address and other Legislative papers.

By laying a copy of the Governor's address on the table, the object of the address was substantially served and the members could become aware of the contents of the address. But can laying on the table be a substitute for delivery of the address by the Governor? The answer should ordinarily be in the negative. But the negative answer admits of an exception. Where the Constitution casts a duty upon the Governor and where the Governor makes attempt to perform that duty but fails to do so in a prescribed manner although does so in substance (in the instant case the written text of the address being laid on the table of the Assembly) the procedural failure should not be over emphasised and the duty should not be treated as wholly unperformed with consequences of non-performance following it. In the facts of the instant case I hold that the constitutional duty of the Governor was substantially performed although the performance was attended by a good deal of irregularity in procedure. The consequence of non-delivery of the whole of the address, by word of mouth, was not such as rendered the subsequent proceedings inside the Legislative Chamber illegal but merely resulted in procedural irregularity. Such an irregularity cannot be called in question under clause (2) of Article 212." Syed Abdul Vs. West Bengal Legislative Assembly, *AIR*, 1966, Calcutta, p. 370. (B.N. Chatterjee Judge).

136. *Tribune*, Ambala Cantt., March 3, 1966.
137. *ibid.*
138. Yogendra Nath Vs. State, *AIR*, 1967, Rajasthan, 125.
139. "The provision of Article 176 are mandatory, unless the provisions are complied with, that is to say, unless the Governor delivers a speech informing the Legislature of the causes of the summons the Legislature cannot meet to transact Legislative business. A Governor cannot decline to

deliver a speech and thus refuse to perform a constitutional duty. If a Governor is incapacitated from delivering a speech himself, the President may make other provisions under article 160 of the Constitution, for performance of that constitutional function of the Governor. But when the Governor makes due attempt to perform the duty under article 176 but fails and makes up the failure by publication of the address to members of the Legislature by a well-known method namely by laying the address on the Table of the House, the duty is merely irregularly performed and the validity of such performance shall not be called in question by reason of such irregularity alone. But if the Legislature meets and transacts legislative business, without the preliminary of an address by the Governor, when required under article 176 its proceedings are illegal and invalid and may be questioned in a Court of Law.

There is one reason which has induced me not to place much emphasis on the irregularity, unless there grows a constitutional convention that the Governor's address shall be heard with attention, respect and ceremony due to the constitutional head of a State, there may be occasions when members of the Legislature may indulge in loud shoutings and unruly behaviour, when the Governor comes to address. If the shoutings be loud enough or the behaviour sufficiently unruly, a Governor may not be able to begin or to finish the address due to human limitations and may have to think of other modes of publication of the address. To hold that Legislature must not be deemed to have met when a Governor is unable to begin or to finish the address under article 176, and is compelled otherwise to publish the address is to put a value on such disturbances which they do not deserve. In that event, a sufficiently noisy Opposition may prevent the Governor from addressing the Legislature, under article 176 by loud shoutings and thus make it impossible for the Legislature to meet for the budget session. I am unwilling to reward disturbances with such premium." Syed Abdul Vs. West Bengal Legislative Assembly, B.N. Banerjee, Judge, *AIR*, 1966, Calcutta p. 370.

140. When B.D. Jatti, the Governor of Orissa came to address the first session of the Assembly on March 22, 1974, the entire Opposition remained sitting like in West Bengal and they did not permit him to speak. He left the House hurriedly after placing the address on the table. *Indian Express*, March 23, 1974, p. 1.
141. *Patriot*, March 8, 1969, p. 7.
142. *Statesman*, March 15, 1969, p. 1.
143. Article 212 (2) says "No Officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers.
144. Article 212 (1) says "The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure."
145. It was because of this reason the Congress opposition in the Punjab

Assembly demanded the recall of the Governor, Dr D. C. Pavate "for the Governor is a party to the passing of the 1968-69 budget, but he has chosen to criticise his own action during the address he has delivered to the Assembly...Captain Rattan Singh, Deputy leader of the Congress party, felt sorry for a Governor who "has no sense of self respect." He said it was the same Governor who had certified the 1968-69 budget and "such a Governor who puts his signature on a document and does not stand by it, or who reads out an address without even realising that he is contradicting himself, should be recalled.

Captain Rattan Singh's reference was to paragraphs three and four of the Governor's address to the Assembly which described the budget session of the Legislative Assembly in March 1968, (when Lachhman Singh Gill's minority Government was in power with the help of the Congress) as an "unfortunate and painful chapter in the history of democracy in the country because police were brought into the floor of the Punjab Assembly and constitutional rights and practices were gravely violated during the so called passage of the annual budget." *Statesman* March 19, 1968, p. 10.

146. *Statesman*, March 19, 1968, p. 10.
147. Shri Krishan Kant, *Parliamentary Debates*, *Rajya Sabha*, Vol. LXVII, No. 21, March 17, 1969, Col. 4257
148. *Rajya Sabha Debates*, Vol. LXVII, No. 21, March 17, 1969, Col. 4277.

XI

The Role of the Governor in Legislation

POWER OF GIVING ASSENT TO BILLS

According to Article 168 of the Constitution the State Legislature consists of the Governor and the Legislative Assembly of the State where there is a uni-cameral Legislature and where there is a bi-cameral Legislature, it consists of the Governor, the Legislative Assembly and the Legislative Council. The Governor, therefore, is an integral part of the State Legislature and as such plays quite a significant role in Legislation under article 200.[1] No bill can become an act unless, he gives his assent to it. About the power of giving assent to Bills it should be noted that the Constitution does not fix any time limit within which the Governor is to give or withhold his assent.

It is interesting to know that in the Draft Constitution prepared by B. N. Rau, the Constitutional Adviser and approved by the Drafting Committee, articles 91 and 175, that is, articles 111 and 200 of the present Constitution, dealing with the powers of President and Governor respectively, to give assent to the Bills were different in three respects. Firstly, under article 91, the President was to return the Bill for reconsideration "not later than six weeks after the presentation to him of a Bill for assent," but no such time limit was fixed for the Governor to return the Bill for reconsideration. Secondly, article 175 provided that "the Governor may, in his discretion return the Bill...." but the words in his discretion did not appear in article 91. Thirdly, the Governor could return the Bill for reconsideration where there was only one House of Legislature, which means the Governors of those States which were to have a bi-cameral Legislature were denied this power. But later on this article was prepared as a carbon copy of article 111 of the present Constitution and the language of article 111 (article 91 of the Draft Constitution)

underwent a change because when that article was being discussed by the Constituent Assembly, Dr Ambedkar moved an amendment that for the words "not later than six weeks" the words "as soon as possible" be substituted."[2] Hence, there is no time limit within which the Governor is to give his assent.

But does the phrase "as soon as possible" in the first proviso of article 200, not fix some time limit for giving or withholding assent ? It seems it does not do so, firstly, because this phrase is quite vague and according to H. V. Kamath : "Nobody knows what 'as soon as possible' means. We know in the Legislative Assemblies Ministers are in the habit of answering questions by saying 'as soon as possible' when we ask "when will this thing be done?', the answer is 'as soon as possible' or 'very soon'. But six months later, the same question is put, and the answer is again, 'as soon as possible' or 'very soon'. This phrase is vague, purposeless and meaningless and it should not find a place in the Constitution, especially in an article of this nature where we specify that the President must do a thing within a period of time."[3]

The fact that the phrase "as soon as possible" is vague, was accepted even by Dr Ambedkar himself when he said : "I think 'as soon as possible' may be worked in such a manner that the matter may be placed before Parliament within one month, within two months or may be even a fortnight. It is a most elastic phrase."[4]

Secondly, even this vague phrase "as soon as possible" is not used in connection with giving or withholding assent. Had it been so, then this phrase would have been used in the first part of article 200 and not in the first proviso. In fact, under article 200 the Governor, it seems, has four alternatives : He may :

(i) give assent :

(ii) withhold assent :

(iii) return it back for reconsideration ; and

(iv) reserve it for the consideration of the President.

The first proviso of article 200 deals with the third alternative given to the Governor. Under this proviso it does not seem to be mandatory on the part of the Governor to return a Bill back for reconsideration, from which assent has been withheld. Had it been mandatory to do so, then as in other Constitutions[5] it would have been clearly mentioned that a Bill from which the assent has

been withheld, would, be sent back for reconsideration. The use of the word 'may' instead of 'shall' gives some amount of option to the Governor in sending a Bill back for reconsideration. It is, of course, a fact that sometimes the word 'may' means 'shall', but it seems that here it is not so because the word 'shall' has been used thrice in this very article for giving or withholding assent. The same word could have been used for sending a Bill back for reconsideration, if it had been mandatory for the Governor to do so.

Whether the Governor has three alternatives or four, may be a point of dispute because some of the experts of the Constitutional Law may say that he has only three alternatives, namely : He may :

(i) give assent ;

(ii) withhold assent and send it back for reconsideration ; and

(iii) reserve the Bill for the consideration of the President.

But it is difficult to agree with this view because in the first instance the language of the First proviso of article 200 does not support this contention. This proviso, for example, says that "the Governor may as as soon possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and in particular, will consider the desirability of introducing any such amendment as he may recommend in his message ....." When the Governor withholds his assent, there seems to be no need for *requesting* and sending a message for *reconsideration* or *recommending amendments*. If he is to *request* or *recommend amendments*, he would do so before the assent has been withheld and not after withholding the assent. For instance, at the Centre when the President recommended the reconsideration of certain provisions of Kerala Education Bill 1957 and Madhya Pradesh Panchayat Bill 1961, he did so before withholding his assent. This shows that for sending a Bill back for reconsideration, withholding of an assent is not a pre-condition. In fact, when the Governor or the President withholds assent the Bill is not sent back for reconsideration. For instance, when the President vetoed the PEPSU appropriation Bill on March 8, 1954, it was not sent back for reconsideration.[6]

This contention that the Governor has four alternatives under article 200, is also supported by the Constituent Assembly Debates. In the Draft Constitution the language of this proviso was that "where there is only one House of Legislature and the Bill has been passed by that House, the Governor may, *in his* discretion, return the Bill together with a message requesting that the House will reconsider the Bill or any specified provisions thereof....."[7] But later on the present proviso was substituted in its place and while speaking on the first proviso article 175 of the Draft Constitution, which is article 200 of the Constitution, Shri T.T. Krishnamachari in reply to Professor Shibban Lal Sexana said : "I would ask him to remember one particular point to which Dr Ambedkar drew pointed attention, viz., that the Governor will not be exercising his discretion in the matter of referring a Bill back to the House with a message. That provision has gone out of the picture. The Governor is no longer vested with any discretion. If it happens that as per further consideration he does so expressly on the advice of his Council of Ministers. The provision has merely been made to be used if an occasion arises when the formalities envisaged in article 172 (Draft) which has already been passed, do not perhaps go through, but there is some point of the Bill which has been accepted by the upper House which the Ministry thereafter finds to be modified. Then they will use this procedure ; they will use the Governor to hold up the further proceedings of the Bill and remit it back to the Lower House with his message.

If my honourable friend understands that the Governor cannot act on his own, he can only act on the advice of the Ministry, then the whole picture will fall clearly in its proper place before him. It may happen that the whole procedure envisaged in article 172 (Draft) also goes through and then again something might have to be done in the manner laid down by this particular proviso but it is perhaps unlikely. It is a saving clause and vests power in the hands of the Ministry to remedy a hasty action that they might have been undertaken or enable them to take an action which they feel they ought to in order to meet popular opinion which is reflected outside the House in some form or another and for this purpose only this new proviso has been put in. It does not abridge the power of the responsible Ministry in any way and, therefore, it does not detract from the Lower House to which the Ministry is undoubtedly responsible ; it does not confer any more power on

the Governor. On the other hand it curtails the power of the Governor for the position envisaged in the original proviso which it seeks to supplant."[8]

It means that the powers of sending a Bill back for reconsideration given to the Governor by this proviso are to be exercised on the advice of the Ministry. But this is not the position when the Governor vetoes the Bill because in that case, it seems, the Governor exercises his individual judgement. This contention is supported by the fact that the Ministry ordinarily would not ask the Governor to withhold assent from the Bill sponsored by it and no Bill can be passed against the wishes of the Ministry so long as it has a majority in the Assembly. Besides this, if the Governor was to veto a Bill only on the recommendation of the Ministry then there would have been no need for the provision that "if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor should not withhold assent therefrom."[9]

This shows that the first proviso of article 200 deals with the third alternative and the Governor has four alternatives under this article. Whether the Governor is to exercise the power of returning a Bill back for reconsideration only on the advice of the Ministry, is a point of dispute.

But it is just possible that some of the constitutional experts may not agree with this view and they may still argue that the first proviso of article 200 deals with all those Bills from which assent has been withheld and it is mandatory for the Governor to return all such Bills to the Legislature for reconsideration. If this line of argument is accepted, then the Governor gets the power of vetoing the Money Bills because the proviso of article 200 clearly prevents the Governor from sending the Money Bills back for reconsideration. To Money Bills, the assent is either to be given or it is to be withheld. If it is withheld, Legislature has no power to override his veto because the method prescribed by the first proviso of article 200 deals with only those Bills which are sent back for reconsideration but Money Bills cannot be sent back for this purpose. This would mean that the Governor has the final power of withholding assent from any bill including Money Bills except those which he sends back for reconsideration. D.D. Basu agrees with this view.[10] It will, however, not be out of place to mention here that ordinarily the Governor would not refuse to give

assent to Money Bills which are introduced with his prior consent.

It is, of course, a fact that the proviso of article 111 on the basis of which the first proviso of article 200 has been modelled, was inserted in the Constitution to overpower the Presidential and Governor's veto,[11] but the lacuna which seems to have remained is that this phrase is not placed at a proper place. In its present form it only refers to the Bills from which are sent back for reconsideration and not to the Bills from which assent has been withheld. The mere fact that this amendment was moved to cover the Presidential veto does not in any way alter the present constitutional position and it seems that the President and the Governor by withholding assent may kill a Bill finally.

It may, however, be argued that if the Governor kills a Bill finally by withholding his assent, it will be against the spirit of the Constitution and also against the intentions of its framers. On this point the Supreme Court has already decided that the spirit of the Constitution cannot prevail against the letter of the Constitution.[12]

In fact, attempts have quite often been made to persuade the Supreme Court that a constitutional provision meant what some speakers in the Constituent Assembly had said. In the State of Travancore Cochin Vs. Bombay Co. Ltd., Allepy, the Supreme Court has held that "the speeches made by the members of the Constituent Assembly in the course of the Debates on the Draft Constitution cannot be used in interpreting an article of the Constitution."[13] but they do have value as a matter of historical interest.[14] In the case of West Bengal Co. Ltd., Vs. the State of Bihar (1955), it had the distinction of hearing "the Chairman of the Drafting Committee of the Constituent Assembly argue before it what certain constitutional provisions were intended to mean. It refused to seek help from such sources where the provisions were plain and clear."[15] Even some of our leading political leaders have sometimes followed the letter of the Constitution more than its spirit. For instance, in 1959 when proclamation regarding the failure of the constitutional machinery in Kerala was discussed, Bhupesh Gupta demanded that the Governor's report should be placed on the table of the House. To this G. B. Pant, the then Home Minister replied that "the Constitution lays down that the proclamation should be laid on the table of the

House. I have carried out that mandatory direction of the Constitution.... Then Sir, this article lays down that after considering the Governor's report and such information, the President will issue a Proclamation. They laid it down that the Proclamation should be laid on the Table. It was open to them to say that not only the Proclamation but also the report and the information should be laid on the table of the House.... Thus it is evident that the authors of the Constitution did not contemplate that the report and other information should be laid before the House."[16]

Hence, the plea that the killing of a Bill by withholding assent is against the spirit of the Constitution or against the intentions of the framers does not hold good and in the absence of a clear provision in this respect, it seems that the Governor can constitutionally prevent a Bill from becoming an Act. It may, however, be mentioned here that the Governor ordinarily should not do so because if he thinks that a particular Bill is either unconstitutional or undesirable. then he can reserve the Bill for the consideration of the President.

CAN THE POWER OF GIVING ASSENT BE DELEGATED?

Whenever the Governor is to give his assent to a particular Bill, he will declare[17] that he gives his assent and this function, it seems cannot be delegated to the officers subordinate to him under article 154 (1) of the Constitution. The question whether the power of signing Bills can be delegated to others or not was raised in the Constituent Assembly by K. Santhanam while discussing article 53 (1) of the Constitution. He asked : "Does it mean that a Bill passed by a Legislature could be signed by an officer subordinate to the President.?"[18] M. Gopalaswami Ayyanger was of the opinion that "ordinarily we expect the President to sign those Bills in token of his assent, to express his assent on them. Naturally in a case of that sort he would not ordinarily ask other officers to sign for him, but assuming that circumstances arise in which he is unable to append his signature to an assent of that sort, it may be necessary for him to ask that somebody else should sign assent in his name. I do not see anything which is legally improper, or even from a constitutional point of view improper, for somebody to sign even an assent to a Bill passed by the Legislature if the President is unable to do so or thinks in particular circumstances other people might sign in his name. I

think in order to obviate difficulties which would actually arise, the addition of these words is very necessary."[19] But Dr Rajendra Prasad, the then Chairman of the Constituent Assembly did not agree with this view when he said that Clause (1) of article 53 "relates to the Executive powers and not to the Legislative powers. Signing of Bills I suppose come under the Legislative powers."[20] T.T. Krishnamachari, who was piloting Clause (1) of the article 53 on behalf of the Drafting Committee agreed with this view.[21] Subsequently, the Bombay High Court also agreed with the view that giving assent to Bills is a Legislative power. For instance, it held that "the heading of part XI of the Constitution in which this article 254 comes is 'Distribution of Legislative Powers' and consequently the act of the President in giving his assent under article 254 (2) would not be merely an Executive act but would be a part of the Legislative powers which ultimately made such law valid."[22] Since under article 53 (1) the President can delegate some of his Executive powers to his subordinates and not the Legislative powers, hence, the Governor too cannot delegate the power of giving assent to Bills to the officers subordinate to him under article 154 (1) of the Constitution. It may, however, be mentioned here that the assent can be obtained by telephone or by telegram or by sending a special messenger[23] and therefore physical presence of the Governor in the State capital or within the State is not necessary.

RETURNING BILLS FOR RECONSIDERATION

Besides giving assent to Bills or withholding assent therefrom, the Governor may also return the Bill for reconsideration provided that it is not a Money Bill and while returning the Bill he may send a message requesting the House or Houses to reconsider the Bill in the light of the suggestion made by him and the House or Houses, then shall reconsider the Bill "accordingly". But what does the word "accordingly" mean? Does it mean that the House will consider only those suggestions and amendments which have been suggested by the Governor? Though this word suggests that the House will only reconsider the suggestions made by the Governor but it is not a fact because the proviso of article 200 says that the House or Houses "in particular, will consider the desirability of introducing any such amendments as he may recommend in his message." This means that besides considering

the amendments and the suggestions made by the Governor, the House can consider and accept other amendments as well.[24] If the Bill is passed again with or without amendments, the Governor shall not withhold his assent.

It may, however, be asked as to how far the Governor can send a Bill back for reconsideration after the Legislative Assembly which has passed it, has been dissolved? Since the dissolution of the Legislative Assembly neither affects the position of the Bills after they have been passed by the Legislative Assembly, and by both the Houses of the State Legislature, where there is a bicameral Legislature nor the powers of the Governor for sending a Bill back for reconsideration, therefore, it seems as if the Governor can do so. But the use of the phrase "as soon as possible" in connection with the Bills to be sent back for reconsideration is quite significant. It implies that ordinarily the Governor would do so immediately and in the same session if possible, which means to the House which has passed it. In this connection it may also be mentioned that though T.T. Krishnamachari said in the Constituent Assembly that this power will be used on the advice of the Council of Ministers,[25] it is a point of controversy.

RESERVATION OF THE BILLS FOR THE CONSIDERATION OF THE PRESIDENT

The second proviso of article 200 of the Constitution also empowers the Governor to reserve that Bill for the consideration of the President "which in the opinion of the Governor would, if it became Law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill." This proviso is modelled on paragraph 17 of the instrument of instructions issued to the Governor of the provinces under the Government of India Act, 1935.[26] While defending the insertion of this proviso in the Constitution, Dr B.R. Ambedkar said that "the reasons for doing this are that the High Courts are placed under the Centre as well as the Province. So far as the organisation and the territorial jurisdiction of the High Court are concerned, they are undoubtedly under the Centre and the provinces have no power either to alter the organisation of the High Court or the territorial jurisdiction of the High Court. But with regard to pecuniary jurisdiction and the jurisdiction with regard to any matters that are mentioned in the list II,

the powers rest under the new Constitution with the States. It is perfectly possible, for instance, for a State Legislature to pass a Bill to reduce the pecuniary jurisdiction of the High Court by raising the value of the suit that may be entertained by the High Court. That would be one way whereby the State would be in a position to diminish the authority of the High Court.

Secondly, in enacting any measure under any of the entries contained in List II, for instance, debt cancellation or any such matter, it would be open for the provinces to say that the decree made by any such Court or Board shall be final and conclusive and that the High Court should have no jurisdiction in that matter at all."[27]

If the Governor gives an assent to any such Bill it can be challenged in the Court of law on the ground that the Governor is not competent to give assent to such Bills. Such a challenge was in fact, made in "Prem Narain Vs. State of U.P."[28] But every Bill that affects the position of the High Court need not necessarily be reserved under this proviso. It must endanger the Constitutional position of the High Court. This is the opinion expressed by the Allahabad High Court.[29] It may also be mentioned here that the Governor can reserve the Bills other than those which are likely to affect the position of the High Court for the consideration of the President. For instance, the Bills having doubtful constitutional validity[30] or which violate the Directive Principles of the State policy[31] or which are likely to clash with the Union Legislation or policy or require uniformity[32] in Legislation may also be reserved. In fact, under this article the Governor may reserve any Bill for the consideration of the President." In a note prepared for the cabinet the Law Ministry has argued that in the matter of reserving Bills for the assessment of the President, the Governor could by and large act in his discretion."[33]

Besides reserving the Bills for the consideration of the President under the second proviso of article 200, the Governor can also reserve the Bills for the consideration of the President under article 254 (2).[34]

Similarly the Governor also has to reserve Bills for the consideration of the President under the first proviso of articles 31 (3) and 31 (A). If once the Bill is reserved for the consideration of the President, it cannot become a Law unless it receives his assent. It may, however, be mentioned here that such Bills, after

they have received the assent of the President, do not require the assent of the Governor for their validity under article 200 of the Constitution.[35]

Whenever, the Governor reserves the Bill for the consideration of the President under articles 31 (4), 200 and 254 (2), he sends it to the President without his signatures. The use of the word "Bill" supports this contention. But what about reservations of Bills under the first proviso of article 31(A) which says that "where such *Law* is made by the Legislature of a State the provisions of this article shall not apply thereto unless such *Law*, having been reserved for the consideration of the President, has received his assent." The use of the word "Bill" in articles 200 and 254 (2) and the use of the word "Law" in Clauses (3) and (6) of article 31 and in the first proviso of article 31 (A) gives the impression as if the Governor should give his assent to the Bill under these articles and then should reserve it for the consideration of the President. But this is not a fact and the Orissa High Court has held that "there can be no question of the President assenting to a piece of State Legislation which has previously been assented to by the Governor himself."[36] The court has also held that "the expression 'law' is used in Clause (3) of article 31 and in article 31(A) somewhat loosely, to include even a Bill which has not yet become law by being assented to by the President or Governor, as the case may be and that it does not mean a Bill that has first been assented to by the Governor, and thus made into a law before being reserved for the consideration of the President."[37] This is also the opinion of the Rajasthan High Court which has held that "article 31 (3) and the proviso of article 31(A) (1) speak of the law being reserved for the assent of the President and not of the Bill or the Act. The word 'Law' is used in the context as meaning the measure which later becomes the Act. It is not used in the sense of a law passed by the Legislature. There would be no sense in the Raj Pramukh or the Governor assenting to a Bill and then reserving it for the assent of the President."[38] The Calcutta High Court has also agreed with it.[39]

This is also the view of the Supreme Court about the use of the word 'Law' in article 31(3). In State of Bihar Vs. Kameshwar Singh, "it was argued before the Supreme Court that as the word "Legislature" was deliberately used and as the Legislature includes the Governor, he must also assent to the Legislation, although the

assent of the President is only explicitly mentioned therein. Patanjali Shastri, C.J. negatived this proposition and said as follows :

> "I am unable to agree with this view. The term 'Legislature' is not always used in the Constitution as including the Governor, though article 168 makes him a component part of the State Legislature. In article 173, for instance, the word is clearly used in the sense of the house of Legislature and excludes the Governor...If it was intended that such a Law should have the assent of both the Governor and the President, one would expect to find not only a more clear or explicit provision to that effect, but also some reference in article 200 to the Governor's power to reserve a measure for the consideration of the President after himself assenting to it."[40]

It may, however, be mentioned here that under clause 6 of article 31, the 'Law' that is a 'Bill' after it has been assented to by the Governor, was to be submitted to the President for his certification and it seems that there is a difference between the certification of a Law by the President after it has been assented to by the Governor and giving of assent to a Bill by the President.

RATIFICATION OF CONSTITUTIONAL AMENDMENT AND THE ASSENT OF THE GOVERNOR

About the powers of the Governor to give assent to Bills, it should be noted that when the Legislatures ratify the constitutional amendments by passing resolutions under article 368, the assent of the Governor is not needed and the expression 'legislatures' does not include the Governor under article 368. For instance in Jatin Vs. Justice H.K. Bose, the Counsel of the petitioner while attacking the 15th constitutional amendment argued that as the word "Legislature is used in article 368, it means that the assent of the Governor must be taken in each State, before it can be said that a resolution has been ratified, because under article 168, he is a part of the Legislature. In the present case, no assent of the Governor was taken in any State (or at least in eleven States) and therefore, there was no valid resolution ratifying the amending Bill, and the amending Act has not been validly passed."[41] But Justice D.N. Sinha held that "in my opinion this argument is patently defective...we find that the first part (of article 368)

relates to the Bill which has to be passed in a particular manner, and there is specific provision for the assent of the President. So far as the State Legislatures are concerned, it requires that a 'resolution' should be passed ratifying the amendment. Such resolution requires voting, and the Governor never votes upon any issue...The article itself does not require the assent of the Governor while it expressly provides for the assent of the President, it does not provide for the assent of the Governor...In my opinion, the position is quite clear and that a resolution of the State Legislature ratifying a Bill for amendment of the Constitution does not require the assent of the Governor."[42] The Judge also decided in this case that the expression Legislature in article 368 does not include the Governor in spite of the fact that article 168 has made him a component part of it.[43]

It may also be mentioned here that in reserving Bills for the consideration of the President, the Governor exercises his individual judgement. According to Ashok Chanda, "It is nowhere enjoined that the Governor, in making such a reference, should act on the advice of his Council of Ministers. Though constitutional experts are of the opinion that the Governor has no authority to act on his own, this interpretation is not implicit in the express provisions of the Constitution. Nor is any remedy provided if the Governor were to act on his own responsibility in making such a reference."[44]

MINISTERIAL ADVICE AND ARTICLE 200

One of the questions which may be asked about the powers of the Governor to assent Bills, to withhold assent, to return Bills for the reconsideration and to reserve them for the consideration of the President under Article 200, is whether this power should be exercised by him purely on the advice of the Council of Ministers or he should exercise his individual judgement?

This controversy was in fact raised at the Centre by Dr Rajendra Prasad in 1951 when he "wrote a letter to Nehru that he proposed to act on his own judgement while giving assent to Bills or sending message to Parliament. Nehru referred the matter to Alladi Krishnaswami Ayyar and M.C. Setalvad. Dr Prasad retreated before arguments of these two legal luminaries. Nine years later, in 1960 he again made a public issue of the scope of Presidential authority in a speech to the Indian Law Institute."[45]

This shows that Dr Rajendra Prasad was not convinced with the opinion of the legal experts in this respect and he was of the view that the Head of the State should exercise his discretion in this respect. This contention is supported by the fact that the first proviso of article 200 provides a method whereby the Legislature can pass a bill over and above the Governor's veto. If the Governor was to exercise this power only according to the advice of the Council of Ministers, then there would have been no need for this provision. Secondly, power to give assent to Bills is legislative power[16] and the Council of Ministers is to aid and advise the Governor in the exercise of his executive function. Thirdly, the Governor sometimes may have to reserve the Bill for the consideration of the President in spite of the advice of the Council of Ministers to the contrary. This shows that under article 200 the Governor can exercise his discretion if he likes and D.C. Pavate, the former Governor of Punjab did so on many occasions.[17]

PREVIOUS RECOMMENDATION FOR INTRODUCING CERTAIN BILLS

There are certain types of Bills which can be introduced in the State Legislature only on the recommendation of the Governor. For instance :

"(1) A Bill or amendment making provision for any of the matters specified in sub-Clauses (a) to (f) of Clause (1) of article 199 shall not be introduced or moved except on the recommendation of the Governor....

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the consolidated Fund of a State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill."[18]

Besides this "No demand for a grant shall be made except on the recommendation of the Governor."[19]

It may be mentioned here that if a Bill which requires the prior consent of the Governor for its introduction, is introduced without such a consent, its consideration may be stopped when it is subsequently found that the consent of the Governor has not been obtained.[20] In case, a Bill which requires the previous recommendation of the Governor is introduced without his

sanction and is passed by the competent legislature, it will be valid if subsequently the Governor gives his assent.[51] Moreover, the question of absence of recommendation cannot be raised in the Legislative Council after the Bill has been passed by the Legislative Assembly.[52] If the Cabinet has harmonious relations with the Governor, it may sometimes go ahead with the Bills mentioned above, even without the prior recommendation of the Governor. If the Cabinet and the Governor belong to different political parties, the Cabinet may not have such a free hand in these matters.

POWER OF ISSUING ORDINANCES

Besides giving assent to the Bills passed by the State Legislature the Governor also has an independent power of law making for a short period by issuing ordinances. This he can do under article 213 of the Constitution which says that "if at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require." It means that the Governor can issue an ordinance provided that the State Legislature is not in session at the time when the ordinance is issued. If the ordinance is issued at a time when both Houses of the State Legislature are in session or where there is only one House in the State Legislature, the Legislative Assembly is in session, the ordinance would be null and void. The expression that 'the State Legislature should not be in session' only means that it should not be in session at the time the ordinance is actually issued.

If the ordinance is promulgated before the order of prorogation of either of the Houses or of the Legislative Assembly, where there is only one House, it will be unconstitutional. This is so because when the State Legislature is in session, the constitutional machinery for the passing of the laws exists and there cannot be any justification for the exercise of this power. But this is not the case when either of the two Houses of the State Legislature or the Legislative Assembly of the State (where there is only one House) is not in session. This is the reason why the Governor has been empowered to issue an ordinance if both the Houses of the State

Legislature (where there is a bi-cameral Legislature) or the Legislative Assembly (if there is a unicameral Legislature) is not in session.

Whenever, the State Legislature is in session and if the Governor feels that a particular law is immediately needed, which is not likely to be passed by the State Legislature immediately because of procedural formalities, the Governor may, prorogue either of the two Houses or the Legislative Assembly, if there is a unicameral Legislature and issue an ordinance. The Governor of Punjab. for instance, prorogued the Assembly, in order to enable him to issue an ordinance and the prorogation was held valid by the Supreme Court.[53]

The ordinance is issued by the Governor when he is satisfied that circumstances exist which render it necessary for him to take immediate action.

It may, however, be asked as to what does the expression "if the Governor is satisfied" mean ? Does it mean the personal satisfaction of the Governor ? The answer is in the affirmative. The Calcutta High Court has held that "it is the satisfaction of the Governor as to the existence of circumstances for promulgating an ordinance that is necessary and such satisfaction is conclusive."[54]

Justice Agarwal of Allahabad High Court agreed with this view when he held that "article 213 speaks of the satisfaction of the Governor, the words in the article being "the Governor is satisfied." The satisfaction of the Governor is his own satisfaction and not of the Court or of any other reasonable person. It is subjective satisfaction and the Court is, therefore, not entitled to enquire into the reasons for that satisfaction or into sufficiency of those reasons.[55]

The Madhya Pradesh High Court while agreeing with this view has held that "the language of article 213 clearly indicates that it is the Governor and he alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an ordinance and the existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test."[56]

ISSUING OF AN ORDINANCE AND THE MINISTERIAL ADVICE

It may, however, be asked as to how far, the Governor is bound to accept the advice of the Council of Ministers in this respect. This controversy recently arose in Punjab when the Governor, (D.C. Pavate) instead of issuing an ordinance, permitting the State Legislators to hold the office of profit, referred it to the Home Ministry in order to know whether it is constitutionally proper for him to issue such an ordinance because in his opinion, issuing of such ordinance amounted to a corrupt practice.[57] Mohinder Singh, General Secretary of the Punjab Congress (O) criticised the State Governor for referring to the Union Home Ministry the proposed ordinance seeking to remove the ban on Legislators from holding offices of profit. He said that the advice of the Council of Ministers was binding on the Governor and his action was violative of the Constitution. He stated that the "Governor should have referred the proposed ordinance to the States Advocate General for legal opinion and not to the Union Home Ministry. The Governor has violated article 213 of the Constitution by practically transferring his Legislative power to the Home Minister."[58] It will not be out of place to mention here that the Governor of Haryana had already issued an ordinance permitting the Legislators to hold office of profit[59] but D.C. Pavate refused to do so. However, his successor M.M. Chowdhury issued an ordinance permitting the Public men to hold offices of profit.[60]

Since, under article 213, the Governor is to be personally satisfied, therefore, it seems that in this respect he is not bound to go by the advice of the Council of Ministers because it is a discretionary power and this power cannot be delegated to anybody else. The Andhra Pradesh High Court has held that :

> "The power to promulgate ordinances under article 123, to suspend the provisions of Arts. 268 to 279 during an emergency, to declare failure of the Constitutional machinery in States under article 356, to declare a financial emergency under article 360, to make rules regulating the recruitment and conditions of services of persons appointed to posts and services in connection with the affairs of the Union under article 309—to enumerate a few out of the various powers—are not powers

of the Union Government ; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under article 258(1)"[61]

This view has been upheld by the Supreme Court when it held that the power of the President to issue an ordinance under article 123 is a Constitutional power and hence it cannot be delegated to any body[62] and, therefore, the President or the Governor is not bound by the advice of the Ministry in this respect. K. Subba Rao, the former Chief Justice of India agrees with this view.[63] It, however, remains a fact that ordinarily this power is exercised by the Governor on the advice of the Chief Minister. If, however, the Governor refuses to issue an ordinance on the advice of the Chief Minister as was done by D.C. Pavate, the Chief Minister has no alternative but to lie low unless he is prepared to create a Constitutional deadlock by resigning or at the most he may request the Centre to withdraw him and the Centre may or may not oblige. In actual practice, this is, however, not ordinarily done. When Homi Modi was the Governor of UP he said, "I am the father of so many children without my knowledge." Ordinances are being issued without his knowledge[64] one of the Governors has confessed in his memoires that he read that an ordinance was promulgated, in the next day's paper. Till then the Governors in whose name the administration was carried on did not know (*Lok Sabha Debates* Vol. 9, Nos.1-5, Col. 801, 1967). But according to B. N. Chakravarti, the Governor of Haryana, ordinarily the Chief Minister should not ask for an ordinance, after the Assembly has been dissolved on his advice, though legally there is no bar.[65]

It will not be out of place to mention here that Governor may even prorogue the session in order to issue an urgently needed ordinance.[66] But whenever, the Governor does so, his motives might be questioned on the ground of an alleged want of good faith and abuse of constitutional powers."[67]

It may, however, also be added here that the Governor shall not without instruction from the President, promulgate any ordinance, even when he is satisfied provided that :

"(1) (a) a bill containing the same provisions would under this Constitution have required the previous sanction

of the President for the introduction thereof into the Legislature ; or

(b) he would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President ; or

(c) an act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President, ...

(3) if and so far as an ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented by the Governor, it shall be void :

provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an act of Parliament or an existing law with respect to a matter enumerated in the concurrent list, an ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him."[68]

It means, the Governor can issue an ordinance only in respect of those matters which are in the State list or in the concurrent list subject to the restrictions imposed by article 213. It may, however, be asked as to how far will it be possible for the Governor to issue an ordinance in connection with the Act, which after having been reserved by the Governor under article 201, has received the Presidential assent. This will depend upon the contents of the act itself. Some of the contents of the act may require Presidential assent for their validity but others may not. However, these contents might have been included in one Bill and hence, the Bill as a whole might have been reserved for the consideration of the President. So far as this type of Acts are concerned, the Governor cannot issue an ordinance with respect of those aspects of the Act which required the Presidential

assent for their validity. But the Governor can issue an ordinance with respect to those aspects of the Act which did not require the Presidential assent for their validity and have been reserved by the Governor otherwise. This point of view has been upheld by the Rajasthan High Court.[69]

About the power of issuing ordinances it should also be noted that no ordinance can be issued on the matters on which the State Legislature is to pass a resolution for their approval or disapproval. For instance, under article 368 the State Legislatures are to ratify the constitutional amendments by resolutions and the Governor cannot ratify it by an ordinance under article 213. This shows that the Governor can issue an ordinance only in respect of those matters on which State Legislature can make Laws and not on matters which are to be ratified by passing the resolutions.

CAN THE BUDGET BE PASSED BY AN ORDINANCE ?

Whether the budget can be passed by an ordinance or not, on this point there are two conflicting opinions. According to one school of thought, the budget can be passed by an ordinance but the other school of thought does not agree with this view. The Union Law Minister, Govinda Menon while speaking on the Punjab crisis said that "the Governor himself could not pass the budget by an ordinance. If the budget cannot be passed, then the Constitution fails."[70] Similar views have been expressed by Shriman Narain the Governor of Gujarat, while rejecting the advice of Hitendra Desai, to dissolve the Assembly.[71] Even the Governors' Committee agree with this view.[72] In fact, in Punjab,[73] West Bengal[74] and Bihar,[75] the President's rule under article 356 had to be imposed after the Assemblies under article 174 (2) (b) because the budget had not been passed before their dissolution and the Central Government was of the opinion that it could be passed by an ordinance on the recommendation of a care-taker Ministry.

But according to the other school of thought, the short-term budget can be passed by an ordinance. For instance, in Orissa, the coalition Ministry headed by H.K. Mahtab resigned on February 21, 1961 without passing the budget or "vote on account". The Governor after consulting the Chief Secretary and Law Officers of the Government, passed the budget by issuing an

ordinance, on February 23, 1961.[76] On February 25, 1961, failure of the constitutional machinery was declared and President's Rule was imposed. After the administration of the State was taken over by the President, the Central Government "wrote to the Governor telling him that this ordinance was not considered legal here."[77] At the same time the Prime Minister said in the Lok Sabha that on this issue, "legal opinions differ, or even judges differ among themselves."[78] But in the absence of a judicial pronouncement in this respect, the opinion of the Central Government cannot be accepted as final.

In fact, the opinion given by the Law Officers of the State seems to be more sound. Just as in spite of the suggestion of the Governor, the out-going Ministry in Orissa refused to pass the budget or "the vote on account", if the Centarl Ministry also does this, what will the President do in that case? Such a situation may happen when there is a coalition Ministry at the Centre, and if that Ministry resigns during the budget session or a few days before the beginning of the budget session. There are many examples at the State level of this type.[79] In such a situation if the budget is not passed by the President by an ordinance, the administration of the country will come to a standstill. When this can happen at a State level, its occurrence, at the Centre, though may be very remote, yet it cannot be completely ruled out. Hence, it appears that in such a situation a short-term budget can be passed by the President, by an ordinance. In Germany President Hindenburg passed the budget by a Presidential decree, when such a situation arose. When it became clear that Brunning Government would not be able to get the budget passed, the budget Bill was withdrawn and it "was promulgated by Presidential decree."[80] It is significant to note that ordinance of the Governor of Orissa was considered illegal by the Central Government and no money was spent out of the budget sanctioned by the ordinance, but the ordinance itself was not withdrawn.[81] According to Lal Bahadur Shastri "it is not necessary to withdraw it...it will lapse by itself, and no action, as I said is being taken under the ordinance."[82] Since the Ordinance was issued by the Governor at a time when the State Legislature was in existence (but not in session) it, therefore, continued to be a valid piece of Legislation upto the time when it automatically lapsed and the

fact that no action was taken under the ordinance, in no way affected its validity.

The contention that the budget can be passed by an ordinance is also supported by the fact that the Governor can levy taxes and spend money by ordinances. For instance, at the Centre, the President promulgated three ordinances designed to raise additional resources to the order of Rupees Seventy Crores to meet the expenditure on Bangla Desh refugees.[83] Similarly there are instances where the President has issued Appropriation (Vote on account) ordinance. For instance, "the Travancore-Cochin Appropriation (Vote on Account) Bill, 1956 passed by Lok Sabha on March 29 was awaiting passage in Rajya Sabha when it was not in session. The President promulgated the Travancore-Cochin Appropriation (Vote on account) Ordinance, 1956 on March 31, 1956 to give effect to the provisions of the Bill as passed by Lok Sabha. The Bill was transferred to Rajya Sabha on April 16, 1956 when Rajya Sabha reassembled."[84]

This shows that the money can be collected and spent by an ordinance and hence, it is difficult to agree with the view that even a short-term budget cannot be passed by an ordinance. Since, the powers of the Governor to issue ordinances under article 213 are the same as are the powers of the President under article 123, hence, it seems that the Governor can also levy taxes and spend them by an ordinance.

But will the imposition of a tax by an ordinance, not be a violation of article 265 which says that "no tax shall be levied or collected except by authority of law?" This article, it seems prevents imposition of a tax by an executive order but not by an ordinance. It has been held by the Travancore-Cochin High Court that "this Article embodies the Principle of no taxation without representation. The 'Law' under this article is a statute law i.e. an Act of the Legislature. A Law authorising the levy of a tax must be made by executive action. This the House of Lords said in Attorney General Vs. Wilt United Dairies Ltd., (1922) 91 L J K B 897 (J). The order of his Highness the Raj Pramukh dated 14.7.1950 (Ex-1) is only an executive order and not (Law) under article 265. The order cannot justify the impost of a Commission on sales by the petitioner. The order imposing Commission of 20 per cent on the sales made by the petitioner in excess of the quota is, therefore, *ultra vires* and void."[85]

But it seems that this ruling of the Travancore-Cochin High Court does not cover the ordinance because under article 213 the powers of the Governor are as wide as the powers of the State Legislature.[86]

The contention that the budget can be passed by an ordinance is also supported by article 357 (1) (c)[87] which empowers Parliament to delegate all the law making powers of the State Legislature to the President except the power to spend money out of the Consolidated Fund without Parliamentary authorisation and clause (c) mentioned above, proves this. It means Parliament cannot delegate the powers to spend money to the President and from this it can be concluded that whenever a particular power is denied to the President or the Governor, it is specifically mentioned in the Constitution.[88] Since the Governor has not been deprived of this power, hence, he can authorise the expenditure by an ordinance under article 213. This shows that though the budget for a short time can also be passed by an ordinance, but this, it seems should be done only when, there is no other alternative. Since article 356 provides an alternative at the State level, hence, ordinarily it is expected that the budget will not be passed by issuing an ordinance because if this practice is started once, then it is likely to undermine the Parliamentary form of Government in the country.

Here it should be noted that the Governor while acting on behalf of the President under article 357, can also levy a tax by issuing an ordinance. For instance, in UP, the Governor imposed a fresh levy by an ordinance in 1968, when the State was under the President's rule but its constitutional propriety was questioned in the Rajya Sabha and S. D. Mishra said that "the Governor had no constitutional power to impose a fresh levy without the approval of Parliament."[89] The Government, however did not agree with it.

APPROVAL AND DURATION OF AN ORDINANCE

Whenever any ordinance is issued under article 213 (2) it :

"(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative

Council, if any, upon the passing of the resolution or, as the case may be on the resolution being agreed to by the Council ; and

(b) may be withdrawn at any time by the Governor. Explanation—where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause."

If an ordinance is issued immediately after the prorogation of the session, then it may continue at the most for six and a half month if the Legislative Assembly exists, unless revoked or resolution disapproving it is passed by both the Houses of the State Legislature earlier, if there is a Legislative Council and by the Legislative Assembly if there is no Legislative Council. It may, however, continue longer than this if the Legislative Assembly is dissolved when the time of its summoning under article 174 (1) is due.

As regards the duration of an ordinance and its operation, they may not always coincide, because the ordinance may even operate with retrospective effect, even from a time when the Legislature was in session[90]. For instance, the acting Governor of Punjab, Justice Mehar Singh promulgated an ordinance, amending the Punjab State Legislature (Prevention of Disqualification) Act 1952. The ordinance provided that the office of Chairman, Panchayat Samiti or Zila Parishad shall be deemed never to have disqualified and shall not disqualify their holder for being chosen or for already being a member of the Punjab Legislature. The ordinance took retrospective effect in the removal of disqualifications.[91] Whether an ordinance can have retrospective effect from a time when the State Legislature was in session was raised in Jotindra Nath Vs. L.P. Sao, in Patna High Court 1956. In that case the court held that it can have retrospective effect.[92]

It may, also be mentioned here that certain ordinances have been issued even to validate the laws which the High Courts have declared *ultra vires*. For instance, ordinance nullifying the judgement of the Supreme Court regarding income tax Tribunal in 1954, had retrospective effect.[93] There are in fact, instances, where the Governors have used their ordinance making powers in order to prevent the High Court from pronouncing a decision which would

not have been liked by the State Government. This was done by the Governor of West Bengal but still, the ordinance was "held to be valid on the ground that the Court was not competent to inquire into the circumstances justifying the promulgation of the ordinance, even though the Full Bench disapproved in strong terms such an executive policy to prevent judicial pronouncement."[94]

It is interesting to know that the ordinance can operate respectively but not the rule made by the Governor under the proviso of article 309 which deals with the recruitment and conditions of the service of persons serving the State.[95]

It may, however, be asked as to how far, is it obligatory on the part of the Governor to lay the ordinance before the State Legislature? No doubt article 213 (2) (a) says that such ordinance "shall be laid" before the State Legislature, but it seems that in spite of the word "shall" it is not mandatory on the part of the Governor to do so, if the ordinance is to come to an end at the expiration of six weeks from the reassembly of the State Legislature or if it is withdrawn earlier. There are many instances where ordinances have been allowed to lapse without placing them on the table of the House.[96] If the Governor does not lay the ordinance before the State Legislature, the only consequence would be that the ordinance shall cease to operate at the expiration of six weeks from the reassembly of the State Legislature and will in no way effect the initial validity of the ordinance. If the Government wants that it should continue, it can introduce a Bill and get it passed.[97] In that case, the ordinance shall have to be laid on the table of the State Legislature at the commencement of the session, following promulgation of the ordinance.

The Governor may, if he so decides, place on the table of the State Legislature an ordinance which has already expired before its meeting. For instance, in 1954, the President promulgated an ordinance imposing a pilgrimage tax on pilgrims visiting Kumbh Mela held that year. Though the ordinance expired before Parliament met, yet the ordinance was placed on the table of Parliament. Since the powers of the Governor and the President are the same in this respect, therefore, the Governor can also do the same.

After the ordinance has been issued the resolution for its revocation can be moved by any member of the State Legislature, irrespective of the fact that the ordinance has not been placed on the table of the State Legislature. By not placing an ordinance

before the State Legislature the Governor cannot deprive the members of their powers of passing a resolution disapproving an ordinance earlier than the expiry of six weeks, which is the maximum time prescribed by the Constitution for its continuation without the approval of the Legislature. Whenever such a resolution of disapproval is passed by both the Houses of the State Legislature (where there is a Legislative Council) or by the Legislative Assembly (where there is no Legislative Council) the ordinance will cease to operate upon the passing of that resolution. If the resolutions of disapproval are passed by both the Houses on different dates, then it will cease to operate upon the passing of the second of those resolutions.

If the State Legislature is bi-cameral and if the resolution of its disapproval is passed only by one House, it will have no effect on its continuance upto six weeks from the reassembly of the State Legislature. It will continue to operate for a period of six weeks from the reassembly of the State Legislature unless rejected by the other House.[98] It means that in spite of its rejection by one of the Houses of the State Legislature, the ordinance continues to operate, though for a short period. But it seems really very strange that even for the rejection of an ordinance, the concurrence of the Legislative Council is needed (if there is a bi-cameral Legislature). It is particularly so because under article 197, the Legislative Assembly can pass the Bill not only without the consent of the Legislative Council but even much against its wishes. When it is so for the passing of bills, why should the positive concurrence of the Legislative Council, be required for its rejection, before the expiry of six weeks from the reassembly of the Assembly ?

This shows that the powers given to the Governor under article 213 are quite substantial because by issuing ordinances the Governor can make the laws passed by the State Legislature inoperative and can make laws with retrospective effect and the possibility of the misuse of this power for a short period cannot be completely ruled out. The two features that may facilitate the abuse of this power are that in the first instance, the Governor alone is to be satisfied. Secondly, there is no time limit fixed for the duration of the ordinance because an ordinance could be reissued and that too with retrospective effect. In fact, the power of issuing ordinances has quite often been misused both at the State and Central level. For instance, the Bank nationalisation ordinance

was issued just 48 hours before beginning of the session of Parliament.

Besides issuing ordinances, the Governor has been given special law making powers under para 5 (1) of Schedule V of the Constitution which says that :

> "Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled area or any part thereof in the State or shall apply to a Scheduled area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

"It is clear that this provision empowers the Governor to apply the law made by Parliament or by a Legislature of the State with such exceptions or modifications in its application or non-application to the Scheduled area as he may direct and if need be to give retrospective effect to the same. This provision is further qualified to override anything contained in the Constitution, by the word "notwithstanding". When the Constitution makers have vested the power in the Governor to apply or not to apply a law of the Parliament or of the Legislature of the State notwithstanding anything contained in the Constitution with such modifications or exceptions as the Governor may deem fit, with the power of amendment of the law as intended to be applied to the Scheduled area. There can be no doubt that the law has to be applied to the area but in its application the law can confine itself to certain class of persons in that area. The power is granted mainly to protect the interests of the Scheduled area or the persons residing in the Scheduled area in which no doubt the majority of the persons are Scheduled Tribes. The Governor of the State is bestowed with responsibility for giving special protection to the tribal areas which are declared by the President to be under clause 6 of schedule V and in discharge of that duty and responsibility he has been given the power to modify or exempt any of the provisions of the Law in its application or non-application to that

XII

The Role of the Governor in Administration

According to article 154, the Executive powers of the State are vested in the Governor and they are to be exercised by him either directly or through the officers subordinate to him. But exercising powers either directly or through the officers subordinate to him implies that he plays some role in the administration of the State. This contention is further supported by articles 161, 201 and 356 of the Constitution. Article 167 imposes a duty on the Chief Minister "to communicate to the Governor of the State all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation; (b) to furnish such information relating to the administration of the affairs of the State and proposals for Legislation as the Governor may call for; and (c) if the Governor so requires to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council." It may, however, be mentioned here that in the day-to-day administration of the State the Governor ordinarily does not interfere. Some of the Governors, in fact, could not play any active part in the administration of the State as a Governor.[1] For instance, Sri Prakasa says: "I remember Mr Aney, then Governor of Bihar, writing to me when I was in Madras that he was surprised how his Chief Minister was making a pilgrimage to Delhi every second day to discuss matters, and never cared to consult him about the same. He was unhappy but helpless for he could neither force his Chief Minister to discuss matters with him nor could he prevent him from going to Delhi.[2] Similarly, H.V.R, Iyengar, the former Home Secretary to the Union Government says: "I know of a Governor who wanted to visit certain drought affected areas in his State partly so that the people could be

assured that the head of the State was interested in their well-being and partly so that he could advise the Ministers about the relief-steps to be taken. But the Chief Minister vetoed his visit."[3] Here it may also be mentioned that the Governor makes his own tour programme within the State but he can go outside the State for a maximum of ten days on each occasion with the previous permission of the President. This permission is called authorisation and ordinarily this authorization comes automatically but in one case "it was refused because the President felt that the Governor was wanting to go holidaying in Assam and not for the performance of any public duty."[4]

It will not be out of place to mention here that some of "the Chief Ministers knowing their own powers and position, started extending less and less consideration to the Governor and did not consult him even in matters where the Constitution required them to do so. In one State, the Chief Minister sent direct to the President mercy petitions from condemned prisoners, even when it was incumbent on him, before rejecting and forwarding them, to obtain the verdict of the Governor. The Chief Minister preferred to keep in direct touch with central authorities and they were encouraged or certainly allowed to do so over the heads of the Governor."[5]

But there have been some of the Governors who have not been merely silent spectators in the administration of the State. For example, "Sri Chandu Lal Trivedi exercised real authority in Punjab... Sir Chandu Lal carried the momentum of his Governorship after 1947 wherever he went."[6] Similarly Dharam Vira in June 1967 called "District Magistrates and Superintendents of Police at Raj Bhavan... At the meeting the Governor is stated to have remarked that the officers should be guided by the Indian Penal Code. They should not forget that they belong to All India Services; their obligations were to the country and the nation. Ministers, he observed should not give them verbal orders, only orders in writing."[7] It may be pointed out here that "the Governor's action in calling district level Magistrates and the Superintendent of Police to a meeting at Raj Bhavan was unconventional and extraordinary. There has been no such meeting since Independence."[8] and as a result thereof the CPI passed a resolution alleging that "by keeping independent contacts with officials of the State, the Governor was encouraging them to sabotage the decisions of the State Government." It condemned "the way the

Governor has been setting up virtually a parallel Government and creating pretexts for the Centre's intervention."[9] CPI, in fact, demanded that the Governor, Dharam Vira "be recalled, and replaced by a person who would rigidly stick to his constitutional role and refrain from disruptive activities." But in spite of this resolution the Governor continued the style of his functioning and in November 1967, he called the Inspector General of Police, and the Commissioner and others to discuss "the so called precautionary measures anticipating the break down of law and order."[10]

Even N. V. Gadgil took keen interest in the affairs of the State as a Governor of Punjab. To a question as to how his advice was received during his stay in Punjab he said that "it was always welcome. In policy matters it was gladly accepted. In just a few appointments it was not accepted."[11] By implication it means he had a say both in policy matters as well as in appointments.

A. P. Jain, also wanted to be a functioning Governor. For instance, he says that "there is no uniform code of conduct for Governors. In America the Governors actively participate in the Presidential election. Under the British pattern the office of the Governor is gubernatorial. However, it is a moot question whether a functioning Governor who takes political decisions and participates in political discussions, as I have been doing in the various committees and conferences of the Union should not be treated more like an American Governor."[12] Even Shriman Narayan as a Governor of Gujarat took keen interest looking after the economic interests of the Scheduled Tribes. At his instance, the State Government conferred occupancy rights on the tribal population in the Dangs district. The village Panchayats were also constituted through democratic elections at his instance. He also got the forest laws suitably amended to afford the 'adivasis' necessary facilities relating to the supply of timber for housing and agricultural purposes.[13]

It may, however, be mentioned here that before 1967, whenever, there was a difference of opinion between the Governor and the Chief Minister, the Governor either yielded or resigned or was transferred. For instance, A.P. Jain, the former Governor of Kerala wrote about the conflict between Jairamdas Daulat Ram the Governor and Sri Krishna Sinha, the Chief Minister of Bihar. He said "I recollect my talks with Jawaharlal Nehru on that issue. His decision was empirical. He said that he could

advise the President to remove the Governor but had no power to tamper with an elected Chief Minister. Shri Jairamdas Daulat Ram resigned the office of the Governor."[14] More or less in similar circumstances Homi Modi had to resign the Governorship of UP.[15]

But now particularly after 1967, the Central Government does not want the Governors to be a mere spectator in the administration of the State. For instance, while inaugurating the annual conference of Governors at Rashtrapati Bhavan, V.V. Giri, the President "laid considerable stress on the responsibilities of Governor in the new context and said that his role has assumed special significance." The President said, "today more than at any time before, the Governors are called upon to face situations which were perhaps not fully envisaged when our Constitution was framed." On the new responsibilities of the Governor, Mr Giri said : "While functioning within the four corners of the Constitution, they have to be active participants in the management of the affairs of the States. I would commend in this connection a paragraph in the instrument of instructions to the Governors which the Constituent Assembly had at one stage thought of incorporating in the Constitution." It exhorted every Governor to do all that lay in him to maintain standard of good administration, promote all measures making for moral, social and economic welfare and tending to fit all classes of population to take their due share in the public life and the Government of the State and to secure amongst all classes and creeds cooperation, good will and mutual respect for religious beliefs and sentiments."[16] More or less similar views were expressed by Mrs Gandhi when she said that "there was need for vigilance on the part of the Governors who had an important but difficult role to play."[17] Y. B. Chavan, the then Home Minister while addressing the Governors' Conference "emphasised that it was the responsibility of the Governors to ensure governance according to the Constitution. Their discretion in the matter was unfettered."[18] Even the Governors' Committee has recommended a "specific and powerful role for a Governor in areas hitherto undefined."[19] Since some of the Governors have made attempts to exercise the powers given to them either by the Constitution or by the Statutes, hence, sometimes there have been conflicts between the Governors and the Chief Ministers.[20] R.R. Diwakar, the former Governor of Bihar, for instance, says that "as regards the powers between the Governor

and the Chief Minister, differences have sometimes arisen as regards, (a) pardon, (b) appointment of Judges of the High Court, (c) appointment of Vice-Chancellors, (d) nomination of members of the University to the Legislative Council, (e) Governor's Confidential Report to the President, (f) Governor's report as regards the Scheduled Castes and Tribes in the State, (g) submission of certain papers to the Governor, and (h) provision in Bills under legislation. This means that whenever, there has been the slightest vestige of discretion to the Governor and some choice of action, there have occurred differences of opinion."[21] Similarly there was a dispute between the Governor and Chief Minister in Bihar on the appointment of a Lok Ayukta. The Governor appointed him much against the wishes of a Chief Minister and the Union Home Ministry upheld this appointment.[22]

It may, however, be mentioned here that if the Governor tries to interfere too much in the day-to-day administration of the State then the State Legislature can prevent him by exercising its powers under article 154 (2) (b) of the Constitution.

POWERS OF APPOINTMENT

The administrative power also includes the power of appointment and the role of the Governor in the administration of the State becomes evident from the fact that all the important appointments are made by the Governor. He appoints the Chief Minister[23] and other Ministers, Chairman and Members of the State Public Service Commission,[24] the Advocate General of the State.[25] He appoints a District Judge in consultation with the High Court[26] and also appointments of persons other than District Judges to the judicial service of a State are to be made by the Governor in accordance with the rules made by him in that behalf after consultation with the States Public Service Commission and with the High Court exercising jurisdiction in relation to such State.[27] The President consults the Governor while specifying the Castes, races or tribes or parts or groups within castes, races or tribes[28] which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory. Similarly, the President consults him while specifying the Tribes or Tribal communities or parts of or groups within Tribes or Tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to the State or Union

Territory.[29] The President also consults the Governor when he appoints the Judges of the State High Courts. Moreover, "Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends."[30]

POWERS OF REMOVAL

The Governor besides making appointments, has the power of removing officers from office. The power of appointment ordinarily includes the power of removal, unless otherwise provided. Of course, in certain cases, it has been clearly mentioned that the officers will hold office during the pleasure of the Governor, for instance, the Chief Minister, the other Ministers,[31] and the Advocate General.[32] But this does not mean that whenever, it is not so mentioned, the officer does not hold office during the pleasure of the Governor because under article 310 (1) "except as expressly provided by the Constitution...every person who is a member of the Civil Service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State." The members of the State Public Service Commission are the exception to this rule.[33]

It should, however be remembered in this connection that in the State of Uttar Pradesh Vs. Babu Ram Upadhyaya, *AIR*, 1961, Sc, 751 with regard to the powers of the Governor under article 310 to terminate the service of a Government servant at pleasure, "it was held that such a power of the Governor is outside the scope of article 154 which speaks the executive power of the State vesting in the Governor."[34]

In the cases of those civil servants who hold office, during the pleasure of the Governor, their services are governed by elaborate civil service rules. In this connection, the Rajasthan High Court has held that "the power conferred by Rule 35 of the Rules, in our opinion, is a power to be exercised by the Governor in his discretion. This is clear from the distinction that the rules themselves make between the powers of the Government and the powers of the Governor. Any act which is to be performed by the Governor in his discretion by or under the Constitution has to be performed by him alone and we do not accept the contention of

the learned Government Advocate that the powers under Rule 35 of the Rules could be exercised by the Government as Governor's delegate. The Governor gave no opportunity of representation to the petitioner. The opportunity was given by the Government. Therefore, the order Ex.12 in Karan Singh's case passed by the Government of Rajasthan is clearly without authority and we have no option but to quash it and his writ petition No. 35 of 1965 is allowed."[35]

CONDUCT OF GOVERNMENT BUSINESS

Besides making these appointments all the executive action of the Government of a State are to be expressed and taken in the name of the Governor[36] and all the orders of the Governor are to be authenticated in such manner as may be specified in the rules made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.[37] It should, however, be remembered that when a particular order is not expressed in the name of the Governor or is not properly authenticated, it is not void For instance, Travancore-Cochin High Court has held that when a particular order is not expressed in the name of the Raj Pramukh or when it is not properly authenticated, it is not void.[38] The Supreme Court, 1952 SC J 235 : *AIR*, 1952 SC, 181 has held that "the consequence of an order of the Government of a State not being expressed to be in the manner specified in the rules is merely to deprive the order of its immunity from being called in question as not being an order passed by the Governor under Clause (2) of article 166 and not to render the order void."

GOVERNOR AS A CHANCELLOR

Governor is also the ex-officio Chancellor in some of the Universities and as such has certain statutory powers of the appointment of the Vice-Chancellor or of nominating members to the various bodies of the University. In some of the cases the Governors have refused to exercise these statutory powers on the recommendation of the Chief Minister. For instance, S.S. Ansari the Governor, "ignored the recommendations of the Orissa Cabinet and appointed Dr Chaudhury Nisamani Nanda a retired Professor of Medicine as Vice-Chancellor of the University. The appointment

of a retired medico as a Head of the farm University surprised the Government and educational circles....The Chief Minister Mr Biswanath Das met the Governor and requested him to revise his decision but Dr Ansari refused to oblige. Ultimately a notification was issued giving the seal of approval to the decision of the Governor who was the Chancellor of the University."[39]

Here, it should be noted that Dharam Vira, the former Governor of West Bengal and Mysore is also of the opinion that while performing his functions as a Chancellor, the Governor is not bound by the advice of the Chief Minister. He, for instance, said; "the Universities are another matter in which Chief Ministers insist on foisting their aid and advice on Governors acting in their capacity as Chancellor. In this, as in several other matters like reserving certain Bills for the assent of the President, the best and ultimate safeguard for Governors is their uprightness, integrity and fearlessness, unlike Ministers or Ministries who have to be dismissed, Governors should carry their resignation letters in their pockets."[40]

POWERS TO GRANT PARDON

According to article 161, the Governor has "the power to grant pardon,[41] reprieves,[42] respites[43] or remission of punishment or to suspend, remit or commute[44] the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends." The executive power of the State extends to all those matters with respect to which the Legislature of the State has the power to make laws, "provided that in any matter with respect to which the Legislature of a State and Parliament have powers to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof." It means with respect to the matters mentioned in the concurrent list, the executive power of the State extends unless Parliament provides otherwise.

About the power of suspension of a sentence under article 161 it should be noted that "the ambit of article 161 is very much wider than article 142 and it is only in a very narrow field that the power contained in article 161 is also contained in article 142, namely the power of suspension of sentence during the period

when the matter is *sub judice* in the Supreme Court. Therefore, on the principle of harmonious construction and to avoid a conflict between the two powers it must be held that article 161 does not deal with the suspension of sentence during the time that article 142 is in operation and the matter is *sub judice* in the Supreme Court.

It is open to the Governor to grant a full pardon at any time even during the pendency of the case in the Supreme Court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all punishment or disqualifications attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive because the judiciary has no such 'mercy jurisdiction'. But the Governor cannot exercise his power of suspension of sentence for the period when the Supreme Court is in seize of the case."[4a]

About the power to grant pardon, it should also be remembered that the Governor of the State has the power to suspend, remit or commute a sentence both under article 72 (3) and under article 161 of the Constitution. In this connection it should be noted that the President has the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends and in all cases where the sentence is a sentence of death.

So too, the Governor has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the state extends. While article 72 (1) (c) confers on the President the powers enumerated in that clause in all cases where the sentence is sentence of death, clause (3) of article expressly leaves unaffected the power of the Governor to suspend, remit or commute a sentence of death. If the object of the Constitution was to make the powers of the President and that of the Governor in all cases where the sentence is sentence of death co-extensive,...

Clause (3) of article 72 would not have saved only the power of the Governor to suspend, remit or commute a sentence of death.

The Clause would have been expressed in wider terms so as to confer a concurrent jurisdiction on both the President and the Governor in respect of the same matter. The two articles in the Constitution can only be reconciled by limiting the power of the Governor to grant pardon to cases not governed by article 72. If so read, the President alone has the exclusive power to grant pardons, reprieves, respites in all cases where the sentence is sentence of death and both the President and the Governor have concurrent power in respect of suspension, remission or commutation of a sentence of death. In other matters, i.e., in respect of offences against any law relating to a matter to which the executive power of the State extends, the Governor has all the powers enumerated in article 161 of the Constitution including the power to grant pardons, reprieves and respites....

To put shortly, the power of the Governor to grant pardons, reprieves and respites in all cases where the sentence is not a sentence of death, and to suspend, remit, or commute, the sentence of any person is co-extensive with the executive power of the State."[46]

NOTES

1. Mrs Vijayalakshmi Pandit writes : "Very early in the day I discovered files containing notes of my predecessors complaining of being kept out in the cold of not being consulted or not being permitted to see files and of a feeling of uselessness. I decided to be guided by my own experience and soon found that I was isolated. I yearned to develop closer personal contacts with my Ministers, to get to know them as individuals—to seek help from them to understand Maharashtra—to discuss Congress matters informally since we all belonged to the same party. But no opportunity was ever offered. *Tribune*, November 21, 1965.
2. *Tribune*, April 17, 1969, p. 4.
3. *Indian Express*, March 4, 1967.
4. Sri Prakasa, *Tribune*, April 7, 1963.
5. *ibid*, April 17, 1967, p. 4.
6. *Indian Express*, March 4, 1967.
7. *Statesman*, June, 25, 1967, p. 1.
8. *ibid.*
9. *ibid.*, July 17, 1967, p. 14.

XIII

Governor as a Representative of the Centre

According to the report of the Administrative Reforms Commission, "the Governor functions, for most purposes, as a part of the State apparatus; but he is meant, at the same time, to be a link with the Centre. This link and his responsibility to the Centre flows out of the Constitution mainly because of the provision that he is appointed and can be dismissed, by the President... The Constitution thus specifically provides for a departure from the strict federal principles and it is relevant to observe that this departure is not fortuitous or casual."[1] This departure has been made because it was in the interest of all India unity and it was expected that it would encourage centripetal tendencies. "It is clear, therefore, that the Constitution makers did not intend the Governor to be only a component in the apparatus of governance at the State level. They meant him also to be an important link with Centre."[2]

Sri Prakasa agrees with this view when he says :

"To my mind, it is clear that the only official emblem today of unity of the country is the Governor. I have a feeling that even the President is not so. The Governor by convention comes to one State from another, and is the representative of the Centre. Besides fulfilling the formal duties as Head of the State as prescribed by the Constitution, and attending to inevitable social engagements that fall to his lot, he is expected to keep the Central authorities informed, of any movements in the State that might tend to break up the unity and integrity of the land. He is also expected to bring to the notice of the Central authorities, the need of the State. He is thus a servant of the State but a representative of the Centre. He can be very useful

functionary both for the State to which he is assigned, and for the country as a whole. In these circumstances, it behoves all concerned to realise the importance of the office of the Governor, and give him his due."[3]

It means the Governor has to act in a dual capacity, that is, as a constitutional head of the State and as a representative of the Centre and this duality in his role is perhaps the most important and certainly the most unusual feature of the Indian Constitution which has made the position of the Governor really a very difficult one. Because of the dual role "the holder of this office is not required to be an inert cypher and that his character, calibre and experience must be of an order that enables him to discharge with skill and detachment his dual responsibility towards the Centre and towards the State executive of which he is the constitutional head...It would be wrong to emphasise one aspect of the character of his role at the expense of the other and successful discharge of his role depends on correctly interpreting the scope and limits of both."[4]

According to Y. B. Chavan "the Governor of a State is a constitutional head except in three articles... These articles are 239 (2), 200 and 356. Except in these three articles, the Governor functions as the constitutional head."[5] Under these three articles the Governor acts as a representative of the Centre and in that capacity he has to perform certain important duties.

As a representative of the Centre it is his duty that he must keep the Centre informed of the affairs of his State whenever he should feel that such things are going on which can endanger the unity of the country. For this purpose the Governors send fortnightly reports to the President. But so long as these reports are sent to the President through the Chief Minister, the purpose may perhaps not be served.[6] But in spite of this A. P. Jain, the former Governor of Kerala, is not in favour of the idea of the Governor writing privately to the President on the affairs of the State without informing the Chief Minister. This would according to him "add to the suspicion of the Chief Minister."[7] It is, however, difficult to agree with this view because "the Governor should be freely allowed to send reports of the state of affairs in his State. As a representative of the Centre, the Governor should see to it that democracy functioned in the State."[8]

As a representative of the Centre, second duty of the Governor is to look after the interests of the State and "if he feels that the Centre must step into, to help in this way or in that, to meet any difficulty which the State itself is in no position to do, then he must tell the Centre as much..."[9] For instance, V. V. Giri when he was the Governor of Kerala "gatecrashed into the office of the Planning Commission" to fight for the rights of Kerala...The Commission had allotted only Rs 105 Crores for the State in the Third Plan. He...represented that the State should get at least Rs 200 Crores for its development programmes. He also raised the issue so vigorously at the Governors' Conference that Mr Nehru asked him whether he was threatening the Centre. He replied that if Socialism was to be implemented in Kerala, the State should get at least Rs 200 Crores for its plan schemes. Ultimately the Centre yielded to some extent, and increased the allotment to Rs 175 Crores."[10]

But while conveying the needs of the State to the Centre, the Governor should not publicly criticise the Central Government, except in the form of a Governor's address prepared by the Council of Ministers, otherwise, it may put him in difficulty. For instance, Dharam Vira, the Governor of Mysore, was summoned by the President to express his displeasure over a speech which he made on January, 15 1972, in which he criticised the Central Government for reducing the special accommodation to the State from 105 crores to 60 crores during the plan period. He said that if this cut is not restored the State Government would not pay the overdrafts. He was summoned to Delhi by the President to express his displeasure. After the President expressed his displeasure, he apologised privately as well as publicly through the Press. This happened just 15 days before his retirement.[11]

Under article 356, as a representative of the Centre, it is his duty to see that the Government of the State is carried on in accordance with the provisions of the Constitution and whenever, he feels that the Government is not being carried on in accordance with the provisions of the Constitution he must report it to the President.

"The duty to report flows from article 355 and is specifically mentioned in article 356. The Union Government has the duty to ensure that the Government of every State is carried on in accordance

with the provisions of the Constitution. It has no agency in the State other than the Governor, to keep it informed of the happenings there and whether the Government is being carried on in accordance with the provisions of the Constitution. In the event of a constitutional break down, the Governor is expected to make a report to the President and can advise him to assume the functions of the Government of a State...[12]

IMPLICATION OF THE TERM FAILURE OF THE CONSTITUTIONAL MACHINERY

Article 356 reads that if the President on the receipt of a report from the Governor, of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State is not being carried on in accordance with the provisions of this Constitution, the President may declare the failure of the constitutional machinery in the State, and may assume all or any of the functions of the Government of the State. But the question arises: what is the meaning of the phrase "the Government of the State is not being carried on in accordance with the provisions of this Constitution." When Pandit Hriday Nath Kunzru raised this question in the Constituent Assembly, Dr Ambedkar as usual, gave a very evasive reply and said: "When we say that the Constitution must be maintained in accordance with the provisions contained in this Constitution we practically mean what the American Constitution means, namely that the form of the Constitution must be maintained.[13]

If this was to be the only meaning of this phrase, there would have perhaps been no controversy because such a provision exists even in the Constitution of the USA.[14] But unfortunately, Dr Ambedkar, while speaking again on this article gave altogether a different meaning of this phrase. He for example said: "It would take me very long to go into a detailed examination of the whole thing and, referring to each article say this is the principle which is established in it and say, if any government or any legislature of a province does not act in accordance with it that would act as a failure of the machinery. The expression 'failure of the machinery' I find has been used in the Government of India Act, 1935. Everybody must be quite familiar therefore, with its *de facto* and *dejure* meaning. I do not think any further explanation is necessary."[15]

This is, of course, true that this expression has been used in the Government of India Act 1935, but at the same time it is very difficult to agree with Dr Ambedkar that everybody is clear about its " *de facto* and *de jure* meaning" and the phrase has the same meaning in the present Constitution as it had in the Government of India Act 1935. This phrase cannot have the same meaning for the simple reason that the Constitutional machinery prescribed by the present Constitution is not a true copy of the Government of India Act 1935. The Constitution provides for a "responsible council of Ministers" to advise the Governor in the execution of his fuctions and it may be mentioned that the failure of this constitutional machinery may be declared by the President only on two grounds:

Firstly, when there is a breakdown of the constitutional machinery in the sense that none of the political parties is in a position to form the Government and the Governor reports the same to the President. This may happen when none of the political parties has a clear majority in the Legislature and if in such a situation the parties do not agree to form a coalition Government, or after the formation of the Government, it has fallen or resigned and nobody is ready to form the Government.[16] Shriman Narayan, the former Governor of Gujarat agrees with this view when he says: "I am of the definite view that the President should take over the administration of a State only when no political party or a coalition of parties is in a position to run the Government with a reasonable quantum of stability."[17] Secondly, when the Constitutional machinery, in the opinion of the President, does not exercise its functions in accordance with the provisions of the Constitution.

In the first case, the President should suspend the constitutional machinery of the State when he receives a report from the Governor about its political breakdown. But such a report ordinarily must be preceded by a dissolution of the Legislative Assembly under article 174 (2) (b) because the "constitutional machinery cannot be regarded ordinarily to have failed unless the dissolution powers are exercised by the Governor," at least once.[18] While speaking in the Constituent Assembly on this issue, Pandit Thakur Das Bhargava said: "That no Constitution can be said to have failed to work unless and until all the provisions of the Constitution relating to the State are exhausted. In my humble opinion

as soon as such a situation arises, the first duty that the Governor will perform will be to dissolve the House. Unless and until every attempt has been made, and unless he finds that even the ordinary liberties cannot be enjoyed by the people, he will not come to the conclusion that the Constitution has failed. I cannot conceive of a situation in which the Governor, first of all, shall not exercise the powers given to him by law, to arrange in such a way that the Constitution is worked.[19]

This was also the opinion of K. Santhanam.[20] In fact, the Constitution requires that the Governor should act in his discretion as soon as he finds that the situation is such that the dissolution of the House is necessary.[21] But the dissolution of the Legislative Assembly by the Governor does not by itself amount to a failure of the constitutional machinery in the State. Sometimes, the Governor may dissolve the Legislative Assembly on the advice of the out voted Chief Minister, as was done by the Raj Pramukh in Travancore Cochin on September, 23 1953,[22] or he may, also, dissolve the Assembly, even before the expiry of its normal term on the advice of the Chief Minister in office as was done in Tamil Nadu and in Haryana in December, 1970 and in January 1971 respectively.

Hence, mid-term poll must be held at least once by exercising the power of dissolution given to the Governors under article 174 (2) (b) before recommending the failure of the constitutional machinery. There seems to be, however, one exception to this general rule. If immediately after the general election a situation arises when none of the political parties is prepared to form the Government and if by keeping the State Legislature in a State of suspended animation for a short time, it is possible to give the State a stable Ministry, the use of article 356 by the President instead of the use of article 174 (2) (b) by the Governor, may be justified.

The failure of the constitutional machinery may also be declared when the President is satisfied either on the basis of a report of the Governor or otherwise that the Government of the State is not being carried on in accordance with the provisions of the Constitution.[23] But before imposing the President's rule on this ground the Central Government should ordinarily give a warning to the State Government.[24]

From the Debates of the Constituent Assembly, and relevant provisions of the Constitution, it can be concluded that the framers of the Constitution expected that article 356 would be used as sparingly as possible[25] and it was not to be used for the sake of good administration.[26] Moreover, as stated by Ramaswamy in the Constituent Assembly, article 356 should be used "only when the Governor finds that a Ministry not responsible to the Assembly is expected to be in office for more than six months. If he feels that the period is likely to be anything less than six months, he cannot maintain that Government cannot be carried on in accordance with the Constitution. Under article 164 (4) it has been laid down that if anybody is not a member of a Legislature, and he is a Minister, he can continue to be in office for six months. That would be a Government in accordance with the Constitution.[27]

In the light of the principles laid down above, if the application of article 356 is critically analysed, it will be found that there was some justification in the fears which were expressed in the Constituent Assembly about the possibility of its misuse. In spite of the assurances given by Dr Ambedkar that this article would be used most sparingly and that too in quite exceptional cases, it has been used quite frequently. Within a period of twenty-three years it has been used thirty seven times,[28] excluding its extension.

Besides it, many a time it has been misused because the grounds are not convincing. For instance, when President's rule was imposed on March 4, 1953 in PEPSU, the then Home Minister listed the following six reasons, justifying the Central intervention.[29]

1. There was no law and order in the State because:
   (a) cultivators did not pay rent;
   (b) hands of a boy were chopped off; and
   (c) dacoities were being committed in the daylight.
2. The House was adjourned by the Speaker on the advice of the Chief Minister.
3. Some members had crossed floor.
4. Election petitions against 15-20 persons were pending in the Court.

5. In one of the election petitions the Chief Minister had been unseated.

6. There was a slender majority of the United Front (26 out of 46).

Similarly when the President't rule in Kerala was imposed on July 31, 1959,[30] the then Law Minister, B.N. Datar speaking in Rajya Sabha on August 24, 1959, listed the following reasons on account of which the Central Government was compelled to intervene in Kerala:

1. "They started on a course of wild and indiscriminate remissions and withdrawals and naturally releases also. There was one particular case...where a man had been condemned to death and his mercy petition was looked into and rejected by the President."[31] But his sentence was commuted to that of life imprisonment.

2. "Interference with the course of administration in general and with the course of judicial administration in particular...In one case they say that the man was placed under suspension without at all following proper rules. Then the man, the poor man... ultimately had to seek redress at the hands of the High Court. And then it was held that his suspension was wrong."[32]

3. "So far as "the disputes between the labour and the management were concerned—they said that the police should be only lookers-on, should not interfere unless an offence is committed, or unless an imminent breach of peace is there. May I point out, Sir, that imminent breach of peace is certainly bad."[33]

4. "In another case "an Officer was found not sufficiently pliable in the sense of carrying out all that was required by the party or by the party bosses, or by higher officers in the interest of the party...he was removed, he was sent to some other place and an officer, who would subserve their policies, the policy of party, not the policy of common good, Government of all the people put together, put in there."[34]

"There are instances, Sir, where even Government moneys were not used as properly as they ought to have been used. The Government of India gave to the Kerala Government a large amount for the interest of cooperative societies...Here in this case, certain type of persons were preferred...it was denied to others on the so-called technical ground that the date that they had chosen had already passed."[35]

6. "There were number of arrests in thousands. The Government has pointed out that the number of arrests made was about 32,000. But the actual number concerned was nearly a lakh or so."[36]

7. Lastly, Rupees 25 lakhs have been collected for party funds.[37]

Now the question arises as to how far the use of article 356 can be justified on the grounds mentioned above. If these are the grounds on the basis of which this article can be used, then there is hardly any State Government in the country which can escape from article 356. It should not escape our attention that Dr Ambedkar gave an assurance in the Constituent Assembly that for the sake of good administration the Central Government was not to interfere in the matters of State. For instance, when H.N. Kunzru asked, "is it the purpose of article 278 and 278-A (articles 355 and 356 of the Present Constitution) to enable the Central Government to intervene in the provincial affairs for the sake of good Government?"[38] Dr Ambedkar stated: "No, no. The Centre is not given that authority...Whether there is good Government or not in the province is not for the Centre to determine."[39]

Hence it seems that the article "does not give any discretion to the President or the Government of India to consider whether the Government was good or bad. That is the inherent problem of democracy...The only thing that in a democracy we would examine under article 356 is whether it was not possible to carry on the Government under constitutional provisions."[40]

Moreover, the adjournment of the House by the Speaker on the advice of the Chief Minister is not a valid ground for the imposition of the President's rule.[41] In Punjab too, the Speaker adjourned the House for two months during the budget session in March 1968 but the President's rule was not imposed. Even in UP in September 1969 and in Haryana in March 1970, the sessions were adjourned and then prorogued on the recommendation of the respective Chief Ministers when a vote of no-confidence against the Speaker and the Ministry respectively were pending but even then the President's rule was not imposed. In Madhya Pradesh too, the Governor prorogued the Assembly in order to prevent the vote of no-confidence from being passed against the Government during the budget session.[42] This also happened in Jammu and

Kashmir in March 1970. These cases were much more serious than the adjournment in PEPSU.

Even the crossing of a floor by the members cannot be a ground for the application of article 356. This is a common political phenomena which prevails in India. It will not be out of place to mention here that in PEPSU, one of the grounds for the imposition of the President's rule was that there was no law and order. But in West Bengal in 1969 the problem of law and order was still worse because the Chief Minister himself proclaimed that "the law and order has broken down,"[43] but still the Governor, S.S. Dhavan did not recommend the President's rule.

Similarly, the suspension of one officer, the transfer of another, the denial of credit to some of the cooperative societies or giving of instruction to the police not to interfere unless there is an imminent breach of peace, the collection of funds for party purposes or the arrests of agitators are not sufficient grounds for recommending the imposition of the President's rule.

One of the most convenient pretexts on the part of the Governor to recommend the President's rule has been that of instability of the Government when immediately after the elections none of the political parties has commanded a clear cut majority, then the Governors have assessed the situation whether a stable Government could be formed or not. If they came to the conclusion that a stable Government could not be formed, they have recommended the imposition of the President's rule. This they have done in spite of the fact that the leader of the largest party or the leader of the opposition was ready to form the Government. This happened in Kerala,[44] in 1965, in Rajasthan[45] in 1967, in Haryana[46] in November 1967, and in Orissa in March 1971[47] and again in March 1973[48]

Now question arises as to how far is it proper on the part of the Governors to recommend the imposition of the President's rule on the ground of instability. It would be better if they do not act as astrologers because in the first instance a Government may prove to be unstable in spite of the fact that it has a clear majority, for instance, Bhagwat Dayal's Government in Haryana and D.P. Mishra's Government in Madhya Pradesh in 1967. Secondly some of the Governments which the Governor thinks to be stable, may prove to be most unstable. For instance, D.K. Borooah, the Governor of Bihar, gave a statement on July 16,

1971, that the Government of the State led by Bhola Paswan is stable but the Government fell on December 27, 1971[48] that is just after five months and ten days. Similarly Nityanand Kanungo another former Governor of Bihar said on October 26, 1970 that the State Government led by Daroga Prashad Rai was stable but that Ministry went out of office on December 18, 1970 just after 53 days.[50] Hence it would be better if they do not forecast in this respect.[51]

It will not be out of place to mention here that some of the Governors have prevented the formation of the Government on the ground of instability, whereas other Governors have installed Governments knowing fully well that those Governments would not be stable. For instance, the Ministry of Lachhman Singh Gill in Punjab[52] and that of Raja Naresh Chandra Singh of Sarangarh in Madhya Pradesh.[53]

It is also interesting to note that in one case the Governor changed his own opinion twice within a week about the possibility of a stable Government. For instance, the Governor of Bihar, in his report to the President on February 11, 1970 recommended that "in my opinion no Government with any reasonable prospect of stability can be formed now,"[54] and recommended the extension of the President's rule for another term of six months. But just after three days, that is, on February 14, he recommended to the President that there is no need for the extension of the President's rule and invited Daroga Rai, the leader of the Congress Legislature party to form the Government.[55] This Government remained in office just for ten months.

This shows that the Governors have not followed any uniform practice in this respect and that is why that sometimes they have been accused of following double standards. Hence, it seems that it would be better if the Governors do not recommend the imposition of the President's rule particularly immediately after the elections, on the basis of their own assessment as was done in Kerala in 1965, in Rajasthan in 1967, and in Orissa in 1971. If the Government in office, proves to be unstable in practice, even then they should be very careful in recommending the President's rule because there is no guarantee that there would be a stable Government after the elections. For instance, in Bihar between March 5, 1967 and June 26, 1968, four Governments of Mahamaya Prashad Sinha, Satish Prasad Singh, B.P. Mandal

and Bhola Paswan Shastri went out of office one after the other in quick succession and the President's rule was imposed on June 26, 1968. Elections were held in February 1969 but that too did not give a stable Government to Bihar because between February 26, 1969 and July 1, 1969, that is within a period of 125 days, the Governments of Harihar Singh[36] and that of Bhola Paswan Shastri[37] went out of office one after the other. Again the President's rule was imposed on July 4, 1969 and the elections were held in February 1970 but even then as a result thereof, the Governments in Bihar could not be stable because between February 16, 1970 and February 9, 1972, three Governments of Daroga Rai, Karpoori Thakur and Bhola Paswan Shastri went out of office. This shows that there is no guarantee of a stable Government even if the elections are held after the imposition of the President's rule. Hence, it seems that the Governors should be very careful in recommending the President's rule on the ground of unstability. If the use of article 356 becomes unavoidable because of unstability then it should be used as a punitive measure, that is, the State should be kept under the President's rule for quite some time may be even for three years in certain exceptional cases so that the opportunist politicians may also feel that even in their own interests they should not change the party loyalties too frequently.

It will not be out of place to mention here that the Governor ordinarily should not recommend the imposition of the President's rule so long as the Chief Minister has a majority in the Assembly and is prepared to demonstrate it by facing the Assembly at a very short notice, unless the Governor is otherwise convinced that the Government of the State is not being carried on in accordance with the provisions of the Constitution. This was in fact done in UP in Charan Singh's case in October, 1970. When the Congress (R) withdrew its support from Charan Singh's Ministry, B. Gopala Reddy, the then Governor instead of asking the Chief Minister to face the Assembly, immediately, did not permit him to do so. The Assembly was to meet on October 6, 1970 and the Chief Minister was prepared to face it even within twenty-four hours, but still the Governor wrote a letter to the President on September 29, 1970, requesting him to impose the Presidential rule because the Chief Minister refused to tender his resignation as demanded by the Governor and as a result thereof the Presidential

rule was imposed on October 3, 1970, that is, just three days before the session of the Assembly was to begin.[58] It seems that this action of the Governor was highly objectionable and there is a feeling that it was based on party rather than constitutional considerations.[59] Since there is an impression that some of the Governors have misused their powers under article 356, hence K. Subba Rao, the former Chief Justice of India has suggested the establishment of convention on advising the President on the imposition of President's rule since this is one of the causes of Centre-State conflicts.[60]

Whenever the failure of the constitutional machinery is declared, the President may by proclamation "assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any-body or authority in the State other than the Legislature of the State..." Whenever, he assumes the functions of the Government or that of the Governor under article 356, he may authorise the Governor to exercise those functions on his behalf. This he can do under article 356 (1) (c) which empowers him to make "incidental and consequential provisions as appear to the President to be necessary or desirable in giving effect to the objects of the Proclamation."

It has been under this provision that the President has empowered the Governors to exercise his functions on his behalf but while doing so the President may or may not impose conditions on the Governor as to the manner in which these powers should be exercised by him. For example, while authorising the Raj Pramukh of Travancore Cochin in 1956 the President imposed the condition that the Raj Pramukh "will act on the advice of the adviser appointed by the President in this behalf."[61] Similarly when the President assumed the functions of the Raj Pramukh of PEPSU in March 1953, because of the failure of constitutional machinery in the State, "the President directed that these functions would be exercised by the Raj Pramukh on the advice of an adviser appointed by him."[62] It will not be out of place to mention that the President in certain other cases did not appoint advisers. For instance, in West Bengal, S.S. Dhavan, the Governor appointed his own advisers and the Government defended his action in this respect when "the Government denied an opposition member's allegation in Lok Sabha that the West Bengal

Governor had violated the Constitution by appointing advisers and by allocating portfolios to them. The Minister of State for Home Affairs, V.C. Shukla, said that the Governor was within his rights to appoint the advisers and in giving charge of certain departments...Mr Shukla...told Mr Basu that the Governor had the authority to appoint advisers."[63]

GOVERNOR AS AN AGENT

While speaking in the Constituent Assembly, T.T. Krishnamachari, said: "I would at once disclaim all ideas, at any rate so far as I am concerned, that we in this House want the future Governor who is to be nominated by the President to be in any sense an agent of the Central Government. I would like that point to be made very clear, because such an idea finds no place in the scheme of Government we envisage for the future."[64]

This view has been also supported by K. Subba Rao the former Chief Justice of the Supreme Court when he said that "the Governor should not act as the agent of the Central Government but should act impartially as the head of the State in terms of the Constitution."[65] But whatever view may have been of the framers of the Constitution, it cannot be denied that under article 357 (1) (a) whenever, the President authorises the Governor to act on his behalf, the Governor acts, as the agent of the Central Government. While speaking on the "constitutional aspects of Dharam Vira episode" in a group discussion organised by the Delhi study group, P. Govinda Menon, the then Law Minister, said that "President's rule was not the Governor's rule. The Union Home Minister could always advise the President with regard to the conduct of a Governor and request his withdrawal because the Union Government administered the President's rule."[66] Hence, so far as the Centre is concerned, it is now firmly of the view that "the President's rule means rule by the Centre...This reading of the constitutional position has also been taken to mean that the Centre may run a State with the help of advisers putting the Governor on shelf and that such advisers could report direct to the Union authorities and take orders without even the knowledge of the Governor. In other words, a Governor could be made ineffective in case the Centre does not think him capable of running the administration. A corollary to this is that if a Governor is considered capable of running a

INDEX